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January 17, 2006

EX PARTE

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: WC Docket No. 04-313, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*

Dear Ms. Dortch:

The attached letter was provided vial email on January 17, 2006 to Samuel Feder, General Counsel; Michelle Carey of Chairman Martin's office; and Tom Navin and Renee Crittendon of the Wireline Competition Bureau. Please place it in the record in the above-referenced proceeding.

Sincerely,

Jennifer L. Hoh

Attachments

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January 17, 2006

Samuel Feder, General Counsel
Federal Communications Commission
12th Street, SW
Washington, DC 20554

Re: WC Docket No. 04-313, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*

Dear Mr. Feder:

Verizon submits this letter in response to the letter filed on December 28, 2005, by the Deputy Director of Telecommunications for the Maine Public Utility Commission. That letter asked the Commission to clarify what she asserted is a "clear conflict" between the cap on the number of UNE DS1 transport circuits in Rule 51.319(e)(2)(ii) and the Commission's description of that rule in paragraph 128 of the *Triennial Review Remand Order*.

As an initial matter, Verizon notes that this question is already pending before the Commission on a petition for reconsideration that was filed on March 28, 2005.[1] Verizon filed a response in opposition to that petition on June 6, 2005, which is attached to this

[1] *See* Petition for Reconsideration of Birch Telecom, Inc., BridgeCom International, Inc., Broadview Networks, Eschelon Telecom, Inc., NuVox Communications, Inc., SNiP LiNK LLC, XO Communications, Inc. and Xspedius Communications, Inc., *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, at 2-4 (filed Mar. 28, 2005).

letter.[2] As Verizon explained in that brief, the cap plainly applies on all routes where UNE DS1 transport is available, not merely those routes where UNE DS3 transport is not available, and there is no conflict between the rule and paragraph 128 of the *TRRO*.

First, the text of the rule unambiguously applies the cap to all routes on which UNE DS1 transport is available. *See* 47 C.F.R. § 51.319(e)(2)(ii)(B) (providing that a CLEC "may obtain a maximum of ten unbundled DS1 dedicated transport circuits *on each route* where DS1 dedicated transport is available on an unbundled basis") (emphasis added). *Second*, there is no conflict between the rule and paragraph 128. Paragraph 128 mentions a particular instance where the cap on UNE DS1 transport circuits applies — "routes for which we determine that there is no unbundling obligation for DS3 transport" — but nothing in the paragraph limits the cap to apply *only* in such instances. *Third*, in a separate section of the order, the Commission sets up the same level cap for *all* DS1 loops. In doing so, the order references back to the transport cap, and makes clear the caps are "similar" and describes the cap without reference to any limitation to only a subset of central offices. *TRRO* ¶ 181 n.489. *Fourth*, there is no plausible reason for the Commission to have imposed a cap on UNE DS1 transport circuits only on those routes where DS3 UNE transport is unavailable. The Commission's reason for establishing the cap applies to all routes: it is "efficient for a carrier to aggregate traffic at approximately 10 DS1s" and to use DS3 transport instead. This means that, where DS3 UNE transport is available, carriers can use DS3 UNEs instead of DS1s. And, where DS3 UNE transport is not available, because the Commission has determined that carriers are not impaired without it, carriers can choose to deploy their own transport, obtain it from a third party, or use special access. In either case, CLECs are not impaired without access to UNE DS1 transport at such traffic volumes and can compete without additional UNE DS1 transport circuits. In addition, permitting CLECs to obtain an unlimited number of UNE DS1 transport circuits on routes where UNE DS3 transport is available would enable CLECs to circumvent the Commission's cap on UNE DS3 transport, *see* 47 C.F.R. § 51.319(e)(ii)(3)(B).

Following the filing of comments on the petition for reconsideration, numerous state commissions have addressed the CLECs' claims of an alleged conflict between paragraph 128 of the *TRRO* and the rule the Commission promulgated. The overwhelming majority of them have found that the cap on UNE DS1 transport applies — as Rule 51.319(e)(2)(ii) states — on all routes where DS1 transport is available as a UNE. As the Texas commission explained, "¶ 128 is not intended to be restrictive such that the 10 DS1 limit *only* applies to routes where DS3 dedicated transport is not available," But instead, that paragraph simply "emphasize[s] and clarif[ies] that a limit of 10 DS1 dedicated transport circuits *also* applies to those routes where unbundled DS1 dedicated transport is

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[2] *See* Response of Verizon to Petitions for Reconsideration, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, at 18-22 (filed June 6, 2005).

available and DS3 unbundled transport is not."[3] The Massachusetts commission likewise found that "the paragraph does not contain any language to indicate that 'only' routes not subject to DS3 unbundling are subject to the DS1 cap."[4] And after examining the Commission's observation that the caps for DS1 transport and DS1 loops are similar, the D.C. commission concluded that "there is no conflict between 47 C.F.R. § 51.319(e)(2)(ii)(B) and the language of the *TRRO*."[5]

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[3] Order No. 45 Resolving Remaining Contract Disputes, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Docket No. 28821, at 9 (Tex. P.U.C. Aug. 5, 2005) (emphasis in original).

[4] Reconsideration Order, *Petition of Verizon New England, Inc. d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order*, D.T.E. 04-33, at 33 (Mass. DTE Dec. 16, 2005).

[5] Order, *Petition of Verizon Washington, D.C. for Arbitration*, TAC-19, at ¶ 35 (D.C. PSC Dec 15, 2005). In addition, state commissions in Michigan, Florida, Rhode Island, and Illinois, and an arbitrator in Vermont have also rejected CLECs' claims that there is no cap on UNE DS1 transport on routes where UNE DS3 transport is available. *See* Order, *Collaborative Proceeding to Monitor and Facilitate Implementation of Accessible Letters Issued by SBC Michigan and Verizon*, Case No. U-14447, at 25 (Mich. PSC Sept. 20, 2005) ("In the Commission's view, the Joint CLECs' argument ignores the meaning of the last sentence of paragraph 128 of the *TRRO*, and fails to take into account ¶ 181 and fn 489 of the *TRRO*."); Order on Arbitration, *Petition for Arbitration of Amendment to Interconnection Agreements with Certain Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Florida by Verizon Florida Inc.*, Docket No. 040156-TP, at 36 (Fla. PSC Dec. 5, 2005) ("[F]or purposes of the amendment, the DS1 cap must be applied as stated in the rule . . . ."); Report and Order, *Verizon Rhode Island's Filing of February 18, 2005 to Amend Tariff No. 18*, Docket No. 3662, at 15 (R.I. PUC July 28, 2005) ("[T]he Commission will adopt the interpretation of the FCC's TRRO which imposes a cap of 10 DS1 transport circuits on all routes where DS1 is available to be unbundled."); Arbitration Decision, *Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 05-0442, at 92 (Ill. Commerce Comm'n Nov. 2, 2005) ("Because this rule is so clear, we do not need to look farther . . . ."); Proposal for Decision, *Petition of Verizon New England, Inc., d/b/a Verizon Vermont, for Arbitration of an Amendment to Interconnection Agreements*, Docket No. 6932, at 52 (Vermont Pub. Serv. Bd. July 15, 2005) ("[E]ach CLEC is limited to a maximum of 10 DS1 circuits on a single route"). Verizon is aware only of one state commission that has taken the opposite position. *See* Order Implementing TRRO Changes, *Ordinary Tariff Filing of Verizon New York Inc. to Comply with the FCC's Triennial Review Order on Remand*, Case No. 05-C-0203 (N.Y. PSC Mar. 16, 2005). That opinion reached its conclusion in a mere two sentences, without any analysis of the arguments that Verizon has presented here and elsewhere. *See id.* at 13.

When the Commission rules on the pending petition for reconsideration, it should confirm that these state commissions have reached the correct interpretation of the Commission's rule.

Please give me a call if you wish to discuss these issues further.

Sincerely,

cc:
M. Carey
T. Navin
R. Crittendon
T. Bragdon, Maine PUC

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	
Unbundled Access to Network Elements	WC Docket No. 04-313
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	CC Docket No. 01-338

RESPONSE OF VERIZON TO PETITIONS FOR RECONSIDERATION

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June 6, 2005

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	
Unbundled Access to Network Elements	WC Docket No. 04-313
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	CC Docket No. 01-338

RESPONSE OF VERIZON[1] TO PETITONS FOR RECONSIDERATION

INTRODUCTION AND SUMMARY

The various petitions for reconsideration of the *Triennial Review Remand Order*[2] ("*TRRO*") seeking to expand unbundling requirements should be denied. These petitions primarily object to the Commission's decision not to require nationwide, blanket unbundling of every DS1 and DS3 loop and transport circuit. The Commission, however, had tried that three times before, only to have its rules vacated each time. And, as the record before the Commission demonstrated, the DS1 and DS3 facilities at issue are ideally suited for competitive supply, given the concentrated demand for and revenue opportunities from such services. Indeed, carriers are providing high-capacity service wherever this demand exists, using a combination of their own or other alternative facilities and special access services purchased from incumbent LECs, with

[1] The Verizon telephone companies ("Verizon") are identified in Appendix A to these comments.

[2] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 & CC Docket No. 01-338, FCC 04-290, 20 FCC Rcd 2533 (rel. Feb. 4, 2005) ("*Triennial Review Remand Order*" or "*TRRO*"), *petitions for review pending, Covad Communications Co., et al. v. FCC, et al.*, Nos. 05-1095, *et al.* (D.C. Cir.).

extremely limited reliance on UNEs. Carriers are providing these high-capacity facilities not only to large enterprises, but also to small and medium-size businesses such as antique dealers, book stores, dry cleaners, florists, gas stations, and hair dressers, to name a few.

In light of the evidence in the record, the Commission's decision not to require unbundling of DS1 and DS3 loops in a handful of wire centers and of DS1 and DS3 transport on a handful of routes did not go nearly far enough. Nonetheless, as the Commission has recognized, where the Commission has not required unbundling, it has eliminated "disincentives for incumbent LECs and competitive LECs to deploy innovative services and facilities." *TRRO* ¶ 36. Increased facilities-based competition can be expected in those wire centers, just as such increased competition has occurred where the Commission has previously eliminated unbundling obligations, such as for broadband facilities. In the meantime, CLECs are continuing to compete in these wire centers without UNEs, both by using their own or other alternative facilities and by using discounted special access services. Verizon, for example, has recently introduced new special access discount plans as a result of negotiations with individual CLECs, which are available to all similarly situated carriers. And Verizon is engaged in negotiations with numerous other carriers. These negotiations are in addition to those that have resulted in commercial agreements with nearly 100 CLECs that permit them to continue serving their customers using Verizon's switches, but at commercially negotiated rates.

For these reasons, and those set forth below, the CLECs' petitions for reconsideration should be denied in their entirety.

Implementation of No Impairment Findings. In the *TRRO*, the Commission expressly held that, as of March 11, 2005, CLECs are not permitted to obtain new UNE arrangements for mass-market circuit switching and certain high-capacity loops and transport circuits. As the

plain language of the *TRRO* and the Commission's regulations make clear — and the overwhelming majority of federal courts and state commissions to consider the question have held — this bar on new UNE arrangements applies irrespective of the provisions in any particular interconnection agreement. Although a number of the CLEC petitioners object to this decision, the Commission's decision to put an end to the expansion of unlawful unbundling by a date certain was correct and well within its authority to undo the consequences of its prior unlawful unbundling orders. The Commission should reject the attempts by these petitioners to perpetuate such unbundling.

No Impairment Findings. The CLEC petitioners raise numerous challenges to the Commission's decisions in the *TRRO* not to require unbundling. None of the CLECs' claims calls into question the Commission's decisions. *First*, there is no merit to CLECs' claims that they should be permitted to obtain unlimited quantities of UNE DS1 transport on those routes where the Commission found impairment. The Commission properly recognized that reasonably efficient carriers can, at a minimum, aggregate traffic onto a DS3 or higher-capacity circuit by the time it is carrying 10 DS1s worth of traffic on that route, and there is no basis for a continuing DS1 unbundling obligation at that point. Any other rule would permit CLECs to evade the Commission's no impairment finding for DS3 transport on certain routes, as well as the Commission's decision to cap the number of UNE DS3 transport circuits that a CLEC can obtain on a given route.

Second, the Commission should reject claims that it should have required wire centers to meet both a business-line density *and* a fiber-based collocation test before eliminating unbundling on transport routes between those wire centers. The Commission's current transport test is already substantially *under*inclusive — requiring unbundling of transport between many

wire centers despite evidence of extensive actual competition and the reasonable inferences of potential competition that must be drawn from such evidence. The CLECs offer no basis for the Commission to make its test even more underinclusive. Iowa Telecom, however, rightly notes that the Commission should have considered the existence of competitive fiber networks that provide alternative transport facilities between ILEC wire centers without the need for collocation. Such networks are evidence that competition is possible without UNEs, and Verizon agrees with Iowa Telecom that the Commission should modify its impairment test to take such evidence into account.

Third, the Commission correctly found that CLECs are not impaired without unbundled access to entrance facilities, which connect ILEC and CLEC networks. As the Commission found, entrance facilities are less costly and have greater revenue potential than interoffice transport, and CLECs obtain such facilities from third parties or through self-deployment. *See TRRO* ¶ 138. The CLECs do not directly challenge any of these findings. Instead, they attempt to evade the Commission's no impairment finding by redefining most (if not all) entrance facilities as dedicated transport. But their claims are contrary to the record evidence that CLECs are not impaired without UNE access to these facilities — however defined — as well as to the express terms of both the *TRRO* and the *Triennial Review Order*[3] ("*TRO*").

Fourth, the Commission should reject T-Mobile's attempt, yet again, to obtain UNEs for wireless carriers. The D.C. Circuit held that the Commission "clearly cannot justify a finding of impairment with respect to wireless," because "market evidence already demonstrates that

[3] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated in part and remanded*, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004).

existing rates outside the compulsion of [47 U.S.C.] § 251(c)(3) don't impede competition." *USTA v. FCC*, 359 F.3d 554, 576-77 (D.C. Cir.) ("*USTA II*"), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004). T-Mobile can point to nothing that calls into question the D.C. Circuit's ruling or the Commission's decision in the *TRRO* following the D.C. Circuit's holding. On the contrary, the record demonstrates that wireless carriers have been tremendously successful — in competition both with each other and with wireline carriers — *without* UNEs.

Fifth, the Commission properly found that there is no impairment with respect to mass-market local switching. That finding is even more clearly correct today, in light of the ever increasing inroads that intermodal competitors — cable companies, VoIP providers, and wireless carriers — are making into the wireline market. APCC *et al.* are the only parties to take issue with the Commission's finding, but they seek to preserve the UNE Platform for a business — payphones — that is declining precisely because of intermodal competition from wireless carriers. APCC *et al*. have no colorable claim of impairment. Indeed, the evidence on which APCC *et al*. rely — questionable as it is — demonstrates that CLECs *can* serve payphone providers in at least some markets without UNEs. In addition, APCC *et al*. simply ignore the Commission's conclusion that, "regardless of *any potential impairment* that may still exist," "the disincentives to investment posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, justify a nationwide bar on such unbundling." *TRRO* ¶ 204 (emphasis added).

Wire Center Classifications. The Commission should reject the CLECs' challenges to its classification of wire centers for its high-capacity loop and transport impairment tests. These CLECs propose that the Commission use a *different* methodology for setting the business-line thresholds and for determining which wire centers satisfy those thresholds, but their petitions

make it clear that they are interested only in more unbundling, not a more accurate line count. The Commission should also reject these CLECs' proposal that changes in the number of business lines or unaffiliated fiber-based collocators in a wire center would automatically result in the imposition of unbundling. Such changes do not demonstrate that a wire center suddenly has new structural barriers to competition such that competition is no longer possible without UNEs. On the contrary, it is far more likely that such changes are the result of *increased* competition.

Enhanced Extended Links ("EELs"). The Commission should reject the CLECs' proposals that the Commission eliminate or further dilute its EEL eligibility criteria. Although the current criteria already do little to ensure that CLECs do not obtain UNEs to provide exclusively long-distance services, these CLECs provide no grounds on which to eliminate those criteria, or weaken them further.

DISCUSSION

I. THE COMMISSION SHOULD REJECT EFFORTS TO MODIFY ITS RULES FOR IMPLEMENTING THE NO IMPAIRMENT FINDINGS IN THE *TRRO*

A. The *TRRO* Established Rules That Implement the Commission's No Impairment Findings as of March 11, 2005

The *TRRO* states unambiguously that, as of March 11, 2005, competitors are "*not* permit[ted]" to place new UNE orders for switching (and, therefore, the UNE-P) and those high-capacity loops and dedicated transport for which the Commission found no impairment. *TRRO* ¶ 199 (emphasis added); *accord id.* ¶¶ 142, 195. The regulations the Commission promulgated make this clear as well, stating that "[r]equesting carriers *may not obtain* new local switching as an unbundled network element." 47 C.F.R. § 51.319(d)(2)(iii) (emphasis added); *accord id.*

§ 51.319(a)(4)(iii), (5)(iii), (6)(ii) (high-capacity loops); *id.* § 51.319(e)(2)(ii)(C), (iii)(C), (iv)(B) (dedicated transport).

The Commission also established 12-month transition periods (18 months for dark fiber) for the embedded base of UNE switching, high-capacity loop, and dedicated transport arrangements. *See, e.g., TRRO* ¶¶ 143-144, 196-197, 227. While the embedded base of UNE arrangements remained in place, the Commission increased the rates that incumbents could charge as of March 11, 2005. *See id.* ¶¶ 145 n.408, 198 n.524, 228 n.630. Finally, the *TRRO* holds that these transition periods and pricing true-ups apply *only* to the embedded base, further confirming that CLECs are prohibited from adding new UNE arrangements after that date. *See id.* ¶¶ 142, 145 n.408, 195, 198 n.524, 199, 228 n.630.

For these reasons, contrary to the claims of CTC *et al.* (at 17-19), there is nothing for the Commission to clarify regarding these aspects of its implementation of its no impairment findings. Indeed, relying on these same sections of the *TRRO*, state commissions and federal courts have overwhelmingly rejected competitors' arguments — repeated here by CTC *et al.* — that the *TRRO* requires continued provision of these UNEs for as long as it takes to amend existing interconnection agreements. State commissions in California, Connecticut, Delaware, Florida, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Texas, Vermont, Virginia, and Washington have either rejected such claims outright or refused to grant CLEC requests to order ILECs indefinitely to continue to accept orders for new UNE arrangements after March 11, 2005.[4] And, in Georgia, Kentucky, and Mississippi and federal courts have issued preliminary

[4] *See, e.g.*, Assigned Commissioner's Ruling Granting in Part Motion for Emergency Order Granting Status Quo for UNE-P Orders, *Petition of Verizon California Inc. (U 1002 C) for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange*

Carriers and Commercial Mobile Radio Service Providers in California Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order, App. No. 04-03-014 (Cal. PUC Mar. 11, 2005); Order No. 6611, *Complaint of A.R.C. Networks, Inc., d/b/a InfoHighway Communications and XO Communications, Inc., Against Verizon Delaware Inc., for Emergency Relief Related to the Continued Provision of Certain Unbundled Network Elements After the Effective Date of the Order on Remand (FCC 04-290 2005)*, No. 334-05 (Del. PSC May 10, 2005); Order Denying Emergency Petitions, *Emergency Petition of Ganoco Inc. d/b/a American Dial Tone, Inc. for a Commission Order Directing Verizon Florida Inc. To Continue To Accept New Unbundled Network Element Orders*, Docket No. 050172-TP (Fla. PSC May 5, 2005); Order, *Complaint of Indiana Bell Tel. Co.*, Cause No. 42749, at 7 (Ind. URC Mar. 9, 2005); Entry, *Complaint of Indiana Bell Tel. Co.*, Cause No. 42749, at 3 (Ind. URC Apr. 6, 2005); Order Granting in Part and Denying in Part Formal Complaint and Motion for an Expedited Order, *General Investigation To Establish a Successor Standard Agreement to the Kansas 271 Interconnection Agreement*, Docket No. 04-SWBT-763-GIT (Kan. CC Mar. 10, 2005); Order, *Request for Commission Investigation for Resold Services (PUC#21) and Unbundled Network Elements (PUC#20)*, Docket No. 2002-682 (Me. PUC Mar. 17, 2005); Letter, *Petition for an Order Preserving Local Exchange Market Stability*, Case No. 9026 (Md. PSC Apr. 28, 2005); Briefing Questions to Additional Parties, *Petition of Verizon New England, Inc. d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers Pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order*, D.T.E. 04-33 (Mass. DTE Mar. 10, 2005); Order, *Application of the Competitive Local Exchange Carriers To Initiate a Commission Investigation*, Case Nos. U-14303, *et al.* (Mich. PSC Mar. 29, 2005); Letter, *Revisions to Tariff No. NHPUC 84*, Docket No. DT 05-034 (N.H. PUC Apr. 22, 2005); Order, *Implementation of the Federal Communications Commission's Triennial Review Order*, Docket No. TO03090705 (N.J. BPU Apr. 2, 2005); Order Implementing *TRRO* Changes, *Ordinary Tariff Filing of Verizon New York Inc. To Comply with the FCC's Triennial Review Order on Remand*, Case No. 05-C-0203 (N.Y. PSC Mar. 16, 2005); Order Concerning New Adds, *Complaints Against BellSouth Telecommunications, Inc. Regarding Implementation of the TRRO*, Docket No. P-55, SUB 1550 (N.C. UC Apr. 25, 2005); Entry, *Emergency Petition of LDMI Telecommunications, Inc., et al., for a Declaratory Ruling Prohibiting SBC Ohio from Breaching its Existing Interconnection Agreements and Preserving the Status Quo with Respect to Unbundled Network Element Orders*, Case Nos. 05-298-TP-UNC, *et al.* (Ohio PUC Mar. 9, 2005); Motion of Chairman Wendell F. Holland, *Pennsylvania PUC v. Verizon Pennsylvania Inc. Tariff No. 216 Revisions*, Docket Nos. R-00049524, *et al.* (Pa. PUC Mar. 23, 2005); Emergency Order, *Petition of Pennsylvania Carriers Coalition for an Emergency Order Mandating a Standstill of Ordering and Provisioning Arrangements*, Docket P-00052158 (Pa. PUC Apr. 7, 2005); Open Meeting, *Review of Petition for Emergency Declaratory Relief by Competitive Local Exchange Carriers*, Docket 3668 (R.I. PUC Mar. 24, 2005); Proposed Order on Clarification, Approved as Written, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Docket No. 28821 (Tex. PUC Mar. 9, 2005); Order Dismissing and Denying, *Petition of A.R.C. Networks Inc. and XO Communications, Inc. for a Declaratory Ruling*, Case No. PUC-2005-00042 (Va. SCC Mar. 24, 2005).

injunctions enjoining state commission decisions that did not enforce the Commission's determination that the *TRRO* "does not permit" CLECs to add new UNE arrangements after March 11, 2005.[5]

As these commissions and courts have held, the *TRRO* bars orders for new UNE arrangements regardless of the terms of existing interconnection agreements. For example, the Mississippi federal court enjoined a Mississippi state commission decision that had required BellSouth to continue accepting orders for new UNE arrangements, notwithstanding the *TRRO*, until it amended its interconnection agreements to reflect the Commission's rule that CLECs "may not obtain" new UNE arrangements. *E.g.*, 47 C.F.R. § 51.319(d)(2)(iii).

The federal court found that "a comprehensive review of all potentially relevant provisions of the TRRO demonstrates convincingly" that the prohibition on new UNE arrangements "would be immediately effective on the date established in the order, March 11, 2005, without regard to the existence of change of law provisions in parties' Interconnection Agreements." *Mississippi Fed. Ct. Order*, 2005 WL 1076643, at *2. The court noted that its decision was consistent with the decisions of "the majority of state utilities commissions and courts" to consider the issue, which it found "not surprising," "[g]iven the clarity with which the FCC stated its position on this issue." *Id.* at *3. The court then rejected the CLECs' arguments based on paragraph 233 of the *TRRO*, which CTC *et al.* repeat in their petition, agreeing with the Georgia federal court that the CLECs' " 'reading of the FCC's order would render paragraph 233

[5] *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., LLC, et al.*, No. 1:05-CV-0674-CC, 2005 WL 807062 (N.D. Ga. Apr. 5, 2005) ("*Georgia Fed. Ct. Order*"), *appeals pending*, Nos. 05-11880-W *et al.* (11th Cir.); *BellSouth Telecomms., Inc. v. Cinergy Communications Co., et al.*, No. 3:05-CV-16-JMH (E.D. Ky. Apr. 22, 2005); *BellSouth Telecomms., Inc. v. Mississippi Pub. Serv. Comm'n, et al.*, No. 3:05CV173LN, 2005 WL 1076643 (S.D. Miss. Apr. 13, 2005) ("*Mississippi Fed. Ct. Order*"). Copies of these decisions are attached to these comments.

inconsistent with the rest of the FCC's decision'" and must be rejected. *Id.* at *3-*4 (quoting *Georgia Fed. Ct. Order*, 2005 WL 807062, at *2); *see also id.* at *4 ("[T]he notion that BellSouth should be made to negotiate over something which the FCC has determined it has no obligation to offer on an unbundled basis and which BellSouth has no intention of offering simply makes no sense.").

B. The Commission Has Authority To Establish Rules That Implement Its No Impairment Findings as of March 11, 2005

Some petitioners nonetheless ask the Commission to change the rules it adopted in the *TRRO* and impose a continuing unbundling obligation for those network elements as to which the Commission found no impairment, at least until existing interconnection agreements are amended. Accordingly, these parties claim that the Commission lacked authority to adopt rules that give immediate effect to its no impairment findings. *See* CTC *et al.* at 19-21.

These parties have matters precisely backwards. The Commission cannot order *any* unbundling in *any* geographic market or market segment unless it *first* finds that CLECs would be impaired without UNE access in that market. This principle has been clear since *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), and repeatedly reaffirmed. *See Iowa Utils. Bd.*, 525 U.S. at 391-92; *USTA v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003); *USTA II*, 359 F.3d at 587. The Commission itself has acknowledged that it cannot "impose [UNE] obligations first and conduct [the] 'impair' inquiry afterwards." *Supplemental Order Clarification*[6] ¶ 16. Forcing incumbents to go through a "change of law" renegotiation process before they could cease providing network elements as UNEs — despite a

[6] Supplemental Order Clarification, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587 (2000) ("*Supplemental Order Clarification*"), *aff'd*, *Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8 (D.C. Cir. 2002).

finding of no impairment by the Commission — would merely be a way of perpetuating the Commission's prior unlawful unbundling requirements indirectly. To the extent that interconnection agreements obligate incumbents to provide access to those network elements as UNEs, those provisions "represent nothing more than an attempt to comply with the requirements of the 1996 Act" as set forth in the Commission's (subsequently vacated) regulations. *AT&T Communications of the Southern States, Inc. v. BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000). As the Mississippi federal court explained, because any UNE provisions in existing agreements with respect to switching and certain high-capacity loops and dedicated transport are merely "vestiges of the now-repudiated FCC regime," the Commission "has authority" to override such provisions. *Mississippi Fed. Ct. Order*, 2005 WL 1076643, at *4.[7]

Contrary to CTC *et al.*'s claims, the Commission therefore had the obligation to exercise its authority and hold that interconnection agreements based on its thrice-vacated unbundling rules could not continue to require incumbents to provide new UNE arrangements as of the effective date of the *TRRO*. Administrative agencies have clearly established authority to correct the consequences of their vacated rules. *See United Gas Improvement Co. v. Callery Props.*,

[7] As Verizon has previously explained at some length, the Commission's decision to make its no impairment findings apply as of March 11, 2005, did not change the rights of CLECs under the terms of all, or virtually all, of Verizon's existing interconnection agreements. *See* Comments of Verizon at 131-32, WC Docket No. 04-313 & CC Docket No. 01-338 (filed Oct. 4, 2004); Reply Comments of Verizon at 149-50, WC Docket No. 04-313 & CC Docket No. 01-338 (filed Oct. 19, 2004); Ex Parte Letter from Dee May, Verizon, to Marlene H. Dortch, FCC, CC Docket Nos. 01-338, *et al.* (July 28, 2004); Ex Parte Letter from Dee May, Verizon, to Marlene H. Dortch, FCC, CC Docket Nos. 01-338, *et al.* (Aug. 20, 2004). That is because these CLECs signed agreements that expressly provide that nothing more than formal notice is required in the event that any unbundling requirements are eliminated, including as a result of any judicial or regulatory decision. Others signed agreements that state only that Verizon will provide UNEs to the extent required by law, which makes any obligations imposed by the agreements contingent on the existence of valid regulations requiring unbundling.

Inc., 382 U.S. 223, 229 (1965) ("An agency, like a court, can undo what is wrongfully done by virtue of its order."); *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1073 (D.C. Cir. 1992) (per curiam) (reading *Callery* to embody the "general principle of agency authority to implement judicial reversals"). The Commission itself has recognized that it has "authority to take action" — even "action that is not expressly authorized by statute" — "in order to ensure that parties injured by [a] judicially invalidated order receive adequate relief." Order, *Qualcomm Inc. Petition for Declaratory Ruling Giving Effect to the Mandate of the District of Columbia Circuit Court of Appeals*, 16 FCC Rcd 4042, ¶ 18 (2000).

CTC *et al.*'s argument with respect to the Commission's authority ignores *Callery* and focuses exclusively on the Commission's authority to reform contracts under the *Mobile-Sierra* standard.[8] Because *Callery* provided the Commission with sufficient authority to correct the consequences of its past legal errors, there was no need for the Commission to consider its authority under *Mobile-Sierra*.

In any event, in the exceptional circumstances presented here, where nine years of interconnection agreements have been based on UNE rules that have been vacated three consecutive times, the *Mobile-Sierra* doctrine would also have authorized the Commission to negate contrary terms of interconnection agreements. Such a finding would have been warranted here, where the absence of a finding of impairment entails that the provision of UNEs at TELRIC rates is contrary to the public interest.[9] As the Supreme Court has explained, normally

[8] *See FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956).

[9] The Commission applied *Mobile-Sierra* to require a fresh look at contracts between ILECs and CMRS providers executed prior to the 1996 Act, in light of the reciprocal compensation provision of § 251(b)(5) of the 1996 Act. First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499,

"there is no duty to aid competitors" because of the "uncertain virtue of forced sharing," *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 879, 881 (2004), and any requirement to offer network elements "not to consumers but to rivals, and at considerable expense and effort," *id*. at 880, would be "counterproductive" to impose outside of the narrow circumstances defined by Congress in § 251(d)(2), *UNE Remand Order*[10] ¶ 473.

CTC *et al.* (at 19) also claim that the rules in the *TRRO* are unlawful because they are an unexplained departure from precedent. But CTC *et al.* ignore the Commission's *Interim Rules Order*,[11] in which the Commission contravened the terms of the vast majority of Verizon's interconnection agreements.[12] As the Commission recognized, discontinuing provision of UNEs pursuant to agreed-upon terms in interconnection agreements such as Verizon's would have been "*permitted* under the court's holding in *USTA II*." *Interim Rules Order* ¶ 17 (emphasis added). Nonetheless, the *Interim Rules Order* overrode those provisions and prevented the "withdrawal of access to UNEs," and did so based solely on the *possibility* that "the Commission ultimately might find [them] to be subject to section 251(c)(3)." *Id.* ¶ 26. Having altered the terms of

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¶ 1095 (1996) ("Courts have held that the Commission has the power . . . to modify . . . provisions of private contracts when necessary to serve the public interest.") (internal quotation marks omitted), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part*, *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *decision on remand*, *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part, rev'd in part sub nom. Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002).

[10] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"), *vacated and remanded*, *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003).

[11] Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 16783 (2004) ("*Interim Rules Order*"), *petitions for review dismissed as moot*, *USTA, et al. v. FCC, et al.*, Nos. 04-1320 & 05-1062 (D.C. Cir. June 1, 2005).

[12] *See supra* note 7.

interconnection agreements to preserve access to UNEs based on a mere possibility, it could not reasonably be characterized as an unexplained departure from precedent for the Commission to take similar action to enable incumbents to refuse to provision new UNE arrangements after the Commission finds that these elements, in fact, are *not* subject to unbundling under the standards of § 251(c)(3) and § 251(d)(2). Indeed, it would have been arbitrary and capricious for the Commission to have refused to do so.

C. The Commission Should Not Modify the Implementation Rules To Permit CLECs Further Access to ILEC Networks Under Rules That Have Never Been Lawful

1. CTC *et al.* (at 21-22) and PACE (at 10-12) purport to seek clarification that, despite the Commission's clear holding that CLECs are not permitted to obtain new UNE arrangements after March 11, 2005, CLECs can order new UNE switching (including UNE-P), new UNE high-capacity loops, and new UNE transport to serve existing customers. Indeed, CTC *et al.* and PACE go so far as to argue that incumbents should be required to provide these new UNE arrangements even at "new locations" — by which these CLECs apparently mean to include a CLEC's end-user customer in New York who establishes a new residence or new business office in Florida.[13] The Commission should reject this request for "clarification," which in fact seeks to expand unbundling to new arrangements despite the fact that such unbundling both has never been lawful and, as the Commission has found, undermines the development of facilities-based competition.

[13] Indeed, it is far from clear whether these CLECs envision any limitations on the rule they claim is inherent in the *TRRO* — or whether Verizon might be required to provision a new UNE-P arrangement to an individual in New York merely because that individual had been obtaining service from a CLEC via UNE-P in BellSouth's territory.

Contrary to the claims of CTC *et al.* and PACE, the *TRRO* holds that CLECs may not add new UNE *arrangements*, not merely new UNE *customers*. The Commission held that competitors are "not permit[ted]" to "add new UNE-P *arrangements*," "new dedicated transport *UNEs*," or "new high-capacity loop *UNEs*." *TRRO* ¶¶ 142, 195, 227 (emphases added). These prohibitions, therefore, apply equally to new and existing CLEC customers. The Commission's regulations are to the same effect, providing that "requesting carriers may not obtain new [high-capacity] loops," "new local switching," or "new [dedicated] transport as unbundled network elements." 47 C.F.R. § 51.319(a)(4)(iii), (5)(iii), (6)(ii), (d)(2)(3), (e)(2)(ii)(C), (iii)(C), (iv)(B).

The fact that the Commission referred, in the context of its transition plan to the "embedded customer base," *e.g.*, *TRRO* ¶ 227, does not mean that CLECs may order new UNEs for existing customers. On the contrary, "embedded customer base" is synonymous with "embedded base of UNE arrangements," because only those customers served via UNE arrangements as of March 11, 2005, are part of a CLEC's embedded base. The Commission made this clear when it referred, without the use of any shorthand, to "the embedded base of unbundled local circuit switching used to serve mass market customers." *Id.* ¶ 226.

Finally, the clarification that CTC *et al.* and PACE seek is directly contrary to the purpose of the 12- and 18-month periods the Commission established for CLECs to transition from UNEs to alternative, lawful arrangements. As the Commission explained, these periods were designed to "provide[] adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition" to lawful arrangements. *TRRO* ¶¶ 143, 196, 227. These CLECs, however, would have competitors free to add new UNE arrangements for existing customers up until the day before they are required to have moved all such arrangements to non-UNE alternatives. Permitting CLECs to add new UNE arrangements, even for existing

customers, therefore, would frustrate the Commission's goal of moving away from competition based on unlawful rules and, in particular, the UNE-P.

2. PACE argues for two changes to the Commission's rules implementing its no impairment finding with respect to mass-market circuit switching and the UNE-P, both of which should be rejected. *First*, PACE (at 3-9) argues that the Commission should have applied the 27-month transition period adopted in the *Triennial Review Order* for CLECs' embedded base of mass-market UNE-P lines. In other words, PACE contends that CLECs should be able to maintain some UNE-P arrangements — despite the fact that such arrangements were obtained under a series of unlawful, vacated rules — until at least *June 2007*. But the Commission abandoned that lengthy transition period after *USTA II*, proposing a far shorter *six-month* period in the *Interim Rules Order*. *See Interim Rules Order* ¶ 29. In the *TRRO*, the Commission adopted "a longer, twelve-month, transition period than was proposed in the *Interim [Rules] Order*." *TRRO* ¶ 227. PACE provides no reason for the Commission to further extend that transition period by an additional 15 months.[14]

Indeed, PACE ignores that CLECs have been on notice since both *USTA II* and the *Interim Rules Order* that their ability to rely on UNE-P would be short-lived, at best. Indeed, CLECs have had since March 2004 to plan for this eventuality, and most sensible CLECs have done so — switching to alternative technologies such as VoIP or signing commercial agreements with incumbents. Verizon alone has signed more than 55 commercial agreements with CLECs that permit them to continue serving their customers using Verizon's switches, but at

[14] The fact that incumbents did not appeal the transition period established in the *Triennial Review Order* is irrelevant, as incumbents successfully appealed, and the D.C. Circuit vacated, the unbundling rules attached to that transition period. *See* PACE at 9. In any event, no competitor appealed the *Interim Rules Order* at all, let alone sought review of the six-month transition period proposed in that order.

commercially negotiated rates. Verizon has entered into interim agreements with another 40 CLECs, and is in active negotiations with approximately 30 more CLECs. Verizon understands that other incumbents have entered into a similarly substantial number of such agreements. For these reasons, there is simply no merit to PACE's claims (at 6) that 12 months provides an insufficient time for CLECs to negotiate and enter into an alternative service arrangement. Tellingly, PACE says nothing about the diligence with which its members have sought to enter into such agreements. At least one PACE member, however, signed a "commercial agreement for the provisioning of wholesale local phone services throughout the nine-state BellSouth region" in January 2005. *See* BellSouth News Release, *BellSouth and Birth Telecom Sign Long-Term Commercial Agreement* (Jan. 12, 2005).[15]

Second, PACE (at 9-10) seeks clarification that, by March 11, 2006, it need only have submitted orders to move its embedded base of UNE-P arrangements to lawful, alternative arrangements. But the *TRRO* states clearly that, "[b]y the end of the twelve month period, requesting carriers *must transition* the affected mass market local circuit switching UNEs to alternative facilities or arrangements." *TRRO* ¶ 227 (emphasis added). That is, CLECs have an obligation to submit the orders necessary to transition their embedded base sufficiently in

[15] PACE (at 6-7) also suggests that a 27-month transition is necessary for them to move all of their existing UNE-P lines to UNE-L arrangements. But CLECs have shown little to no interest in pursing UNE-L arrangements, with competition instead increasingly coming from intermodal alternatives or through commercial agreements. Tellingly, PACE does not even assert that its members are interested in pursuing a UNE-L approach. Verizon has received information from 33 of the approximately 160 CLECs (though from none of the PACE members) with mass-market UNE-P arrangements in Verizon's territory on their plans to transition from UNE-P to lawful alternatives. The CLECs that have responded indicated that they intend to transition the overwhelming majority of their approximately 2.4 million mass-market UNE-P arrangements to either commercial alternative or resale. In any event, the Commission rejected claims that the lengthy transition period PACE seeks is necessary for those few CLECs that do seek to move from UNE-P to UNE-L. *See TRRO* ¶ 227.

advance of the March 11, 2006 deadline so that the orders may be processed and completed by that date. Indeed, in light of the requirement of good faith that applies to both incumbents and competitors under the 1996 Act, CLECs should be submitting orders to transition their embedded base — in whole or in part — as soon as possible. There certainly is no reason CLECs should be permitted to wait until March 10, 2006, to begin submitting orders to convert their embedded base of UNE-P arrangements, nor any reason to require incumbents to continue providing service at the TELRIC plus $1 transitional rate in the event a CLEC takes such actions. Although PACE (at 11) speculates that incumbents might not fulfill CLECs' transition orders by March 11, 2006, Verizon has both the intention and the incentive to provision such orders on or before March 11, 2006, to obtain the higher rates that will apply to whichever lawful alternative arrangement a CLEC selects.

II. THE COMMISSION SHOULD ADOPT IOWA TELECOM'S PROPOSED MODIFICATION TO THE DEDICATED TRANSPORT NO IMPAIRMENT FINDING, BUT SHOULD REJECT THE CLECS' CHALLENGES TO ITS NO IMPAIRMENT FINDINGS

A. The Commission Should Reject the CLECs' Challenges to the Caps on DS1 UNE Loops and Dedicated Transport

In the *TRRO*, the Commission found that CLECs are impaired without UNE access to DS1 high-capacity loops in certain wire centers and to DS1 dedicated transport on routes between certain wire centers. The Commission, however, capped the number of DS1 UNEs that a CLEC could obtain to a particular building or on a particular route at 10. *See TRRO* ¶¶ 128, 181; 47 C.F.R. § 51.319(a)(4)(ii), (e)(2)(ii)(B). As the Commission explained, based on the efficiencies of aggregating traffic, when a CLEC requires more than 10 DS1 loops or transport, a reasonably efficient CLEC would utilize a DS3, so there is no basis for a continuing DS1

unbundling obligation. *See TRRO* ¶¶ 128, 181. CLECs raise a number of claims with respect to these caps, none of which has merit.

1. Birch *et al.* (at 2-3) contend that there is a discrepancy between the cap on DS1 UNE transport as set forth in the Commission's regulations and as described in paragraph 128 of the *TRRO*. The rule the Commission adopted, however, plainly states that a CLEC "may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis." 47 C.F.R. § 51.319(e)(2)(ii)(B). That is, the cap applies regardless of whether UNE DS3 transport is available on that route. The Commission's cap on DS1 UNE transport is consistent with its cap on DS1 UNE loops, which similarly applies regardless of whether UNE DS3 loops are available in the wire center where a particular building is located. *See id.* § 51.319(a)(4)(ii) (CLEC "may obtain a maximum of ten unbundled DS1 loops to any single building in which DS1 loops are available as unbundled loops"). Indeed, the Commission expressly noted that it had imposed a "similar cap" in the context of UNE DS1 loops and transport. *TRRO* ¶ 181 & n.489.

But, if the Commission were to consider making matters even more clear, the only appropriate action would be to modify paragraph 128 to be consistent with the Commission's regulations and the rest of the *TRRO*. Indeed, it would make no sense for the Commission to permit CLECs to obtain an unlimited amount of UNE DS1 transport on routes where CLECs can obtain UNE DS3 transport, as CLECs could easily evade the cap the Commission established for UNE DS3 transport. That is, under the interpretation that Birch *et al.* propose, CLECs could obtain 12 UNE DS3 transport circuits on a route where such UNEs are available, as well as

another 100 or 1,000 DS1 circuits.[16] Such an arrangement would plainly flout the cap the Commission established for UNE DS3 transport. It would also violate the Commission's finding that CLECs are not impaired on those routes without UNE access to more than the capacity provided by 12 DS3 transport circuits. The Commission found that, when a CLEC has 12 DS3s of traffic to transport on a given route, it can deploy its own facilities. Such a CLEC has no need for *any* UNE DS1s on that route, as it can add such circuits to its self-deployed facilities. For these reasons, Birch *et al.*'s request for clarification should be rejected.[17]

2. Birch *et al.* (at 4-5), as well as Cbeyond (at 3-6), argue that the cap on UNE DS1 transport is too low on routes where UNE DS3 transport is unavailable. Although Birch *et al.* do not propose a new cap, Cbeyond proposes new caps that are nearly *20* or *44 times* as high as the cap the Commission adopted. The caps Cbeyond proposes, however, would permit a CLEC to use UNE DS1 transport on routes where the CLEC had enough traffic to fill two or five *OC3s*.[18] But the Commission held in the *Triennial Review Order* that CLECs are not impaired without UNE access to OCn transport. *See TRO* ¶¶ 359, 389. On routes where the Commission has

[16] In fact, based on the Commission's determination that it is "efficient for a carrier to aggregate traffic at approximately 10 DS1s," *TRRO* ¶ 128 & n.358, it would violate the Commission's cap on UNE DS3 transport to permit a CLEC to obtain even a single UNE DS1 transport circuit on a route where that CLEC has already obtained 12 UNE DS3 transport circuits.

[17] Birch *et al.* also note (at 4) that the Commission has not established a limit on the number of UNE DS0 *loops* that a CLEC can obtain to a particular customer's premises, but do not explain what that has to do with the question whether the Commission should limit the amount of DS1 UNE *transport* a CLEC can obtain on routes where DS3 UNE transport is also available. And Birch *et al.* ignore that the Commission's cap on UNE DS1 *loops* applies irrespective of whether UNE DS3 loops are available in that wire center.

[18] Cbeyond (at 5) proposes caps of 194 and 435 DS1s, which is equivalent to nearly 7 and more than 15 *full* DS3s, respectively (*i.e.*, DS3s with all 28 DS1 circuits in use, even though it becomes economic to use a DS3 well before a carrier reaches 28 DS1s). Seven DS3s is equivalent to more than 2 OC3 circuits; 15 DS3s is equivalent to 5 OC3 circuits.

found that CLECs are not impaired without UNE access to DS3 circuits, CLECs should not be permitted to obtain UNE DS1 circuits in quantities equivalent to a *single* DS3 circuit, let alone *multiple* OC3 circuits. In effect, Cbeyond actually seeks reconsideration of the Commission's no impairment findings for DS3 and OCn transport, but provides no basis for the Commission to revisit those determinations.[19]

Birch *et al.* (at 4 & n.10) claim that the evidence in the record does not support the cap the Commission established, because it was based on the comparison of DS1 and DS3 UNE rates. But the Commission's TELRIC rules presuppose that the UNE DS3 rate provides a rough proxy for the cost of an efficient carrier to deploy a DS3 circuit. Birch *et al.*'s real complaint, however, is that moving to DS3 transport requires multiplexing of the individual DS1 transport circuits, and these CLECs would prefer to avoid that cost. *See* Birch *et al.* at 5. But multiplexing is what "reasonably efficient" telephone companies do. *TRRO* ¶ 24. As the Commission recognized, "[w]hen a carrier aggregates sufficient traffic on DS1 facilities such that it effectively could use a DS3 facility," then its ability to do so negates any supposed need for UNE DS1s. *Id.* ¶ 128. Otherwise, CLECs could retain inefficient and uneconomic arrangements, and impose these inefficiencies on incumbents, which would have to maintain the many individual DS1 circuits, rather than transporting that traffic efficiently, over a single, multiplexed DS3 circuit.

[19] In any event, Cbeyond's claims are based on its unsubstantiated assertions of its individual costs of obtaining two DS3 transport circuits in a handful of markets. *See* Cbeyond Declaration of Richard Batelaan ¶¶ 5-11. But the Commission has held that the impairment test requires consideration of "a reasonably efficient competitor" and "*all* the revenue opportunities that such a competitor can reasonably expect to gain over the facilities." *TRRO* ¶ 24; *see id.* ¶ 26 ("[W]e do not attach weight to the individualized circumstances of the actual requesting carrier."). Cbeyond does not demonstrate that the costs it cites are those of a reasonably efficient carrier, let alone compare those costs to the available revenue opportunities.

For the same reason, there is no merit to claims that, in the context of EELs, the cap on UNE DS1 transport has the effect of limiting a CLEC to 10 DS1/DS1 EELs in a wire center, even though the Commission capped UNE DS1 loops at 10 per building. *See* Birch *et al.* at 5-6; Cbeyond at 2; CTC *et al.* at 23. The fact that these CLECs would prefer to avoid the costs of deploying multiplexers, or paying another carrier to multiplex their traffic, provides no basis to increase the number of DS1 UNE transport circuits that a CLEC may obtain.

B. The Commission Should Not Adopt a Conjunctive Wire Center Trigger for UNE Dedicated Transport and Should Add as a Factor the Presence of Competitive Fiber Networks in a Wire Center

In the *TRRO*, the Commission found that CLECs are not impaired without UNE transport on routes between "Tier I" wire centers — those with at least 38,000 business lines *or* at least four fiber-based collocators. *See TRRO* ¶¶ 112, 126, 129, 133. The Commission also found that CLECs are not impaired without UNE DS3 or UNE dark fiber transport on routes between two "Tier 2" wire centers — those with at least 24,000 business lines *or* at least three fiber-based collacators — or between a Tier 1 and a Tier 2 wire center. *See id.* ¶¶ 118, 126, 129, 133. The Commission found that business-line density and fiber-based collocation each "constitute proxies for where sufficient revenue opportunities exist to justify" CLEC self-deployment of transport. *Id.* ¶ 93. The Commission also found that applying these proxies "in a disjunctive tandem will better capture actual and potential deployment than any single measure." *Id.* ¶ 94.

Birch *et al.* (at 17-21) contend that the Commission should have used a *con*junctive test for classifying wire centers — requiring a wire center to have both a certain business-line density and a certain number of fiber-based collocations to qualify for a particular tier. But the Commission found that the data in the record showed that "there is typically a nexus between business line density and fiber-based collocation." *TRRO* ¶ 104. Specifically, the Commission

found that the data showed that two-thirds of the wire centers in Tiers 1 and 2 satisfy *both* the business-line density and fiber-based collocation criteria. *See id.* ¶¶ 114, 118.[20] In light of these data and the D.C. Circuit's determination that the Commission must draw reasonable inferences across markets from evidence of competitive deployment in some markets, the Commission could not have limited its no impairment finding to wire centers satisfying both proxies. That is particularly true where, as the record showed is the case here, CLECs are also self-deploying fiber networks without collocating, providing further evidence that competition is possible in these wire centers without UNEs. As the D.C. Circuit explained, the Commission could not "ignore [such] . . . facilities deployment [in one market] when deciding whether CLECs are impaired with respect to [another market] without a good reason" — that is, without substantial evidence of the same types of "structural impediments to competition" that the court held are necessary for a finding of impairment. *USTA II*, 359 F.3d at 572, 575.

Birch *et al.* provide no "good reason" for finding that wire centers that satisfy one, but not both, of the proxies are materially different from the two-thirds of wire centers in Tiers 1 and 2 that meet both proxies. Instead, they argue only that characteristics of wire centers "can vary based on the individual situation." Birch *et al.* at 20. But the fact that two wire centers are not identical in every respect provides no justification for refusing to follow *USTA II* by drawing reasonable inferences in light of the similarities between the two wire centers.[21]

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[20] Birch *et al.* quibble with this, based on data regarding SBC's Tier 1 wire centers. *See* Birch *et al.* at 21. But they claim only that approximately 63 percent — rather than 67 percent — of SBC's Tier 1 wire centers have both at least 38,000 business lines and at least four fiber-based collocators, an immaterial difference. *See id.*

[21] Birch *et al.* (at 18-19) also contend that the Commission acted inconsistently by requiring a conjunctive test for classifying wire centers for purposes of its high-capacity loop impairment determinations. Any inconsistency, however, should be resolved by making *both* tests *dis*junctive. As the Commission recognized, 75 percent of the wire centers that satisfy its

Iowa Telecom, however, explains that the Commission should add an additional, disjunctive factor for classifying wire centers — the presence of a competitive fiber network in the geographic area served by an incumbent's wire center, even if that competitor has not established fiber-based collocation. *See* Iowa Telecom at 4. As Iowa Telecom points out, a CLEC need not establish fiber-based collocation in the building housing the ILEC's switch to provide competitive transport to and from a wire center. Just as a CLEC's decision to establish fiber-based collocation in a wire center provides evidence that self-deployment of transport is possible to and from that wire center, as well as to and from comparable wire centers, *see TRRO* ¶ 93, a CLEC's decision to establish a fiber-based network in the area served by a wire center provides the same type of evidence, *see* Iowa Telecom at 5-6. The fact that a CLEC is using self-deployed transport to serve end-user customers or to provide transport to other CLECs, without the need to collocate in an ILEC's wire center, demonstrates that it is possible for CLECs to compete by completely bypassing the incumbent's network in that wire center, as well as in comparable wire centers. The Commission should modify its impairment test for dedicated transport to take into account, and draw reasonable inferences from, such evidence of actual competition.

Although Iowa Telecom focuses on the existence of a competitor's POP in a wire center, the Commission should infer that such a POP exists whenever a competitor has deployed its own fiber network in a wire center where it has no collocation arrangements. Such an inference is

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DS3 and DS1 loop impairment tests did not merely satisfy both proxies, but substantially exceeded them. For example, the Commission found that 75 percent of wire centers with at least 60,000 business lines have at least eight fiber-based collocators, more than *double* the number the Commission found necessary to eliminate DS1 unbundling in a wire center. *See TRRO* ¶ 180; *see also id.* ¶¶ 174-175 (DS3 loops). In such circumstances, the requirement to draw reasonable inferences across markets should have compelled the use of a disjunctive test for high-capacity loop unbundling as well.

reasonable, especially given CLECs' demonstrated unwillingness to provide the Commission with evidence that might result in the elimination of unbundling obligations. *See TRRO* ¶ 158 n.442. Therefore, where incumbents have evidence of the existence of a fiber network in a wire center, that should count toward the number of fiber-based collocators in that wire center. But data available to incumbents necessarily understates the number and extent of deployed fiber networks. The Commission, therefore, should also require other carriers to provide detail on where they have deployed fiber networks in wire centers in which they have not collocated.

C. The Commission Should Not Modify Its No Impairment Finding for Entrance Facilities

In the *TRRO*, the Commission found that CLECs "are not impaired without unbundled access to entrance facilities." *TRRO* ¶ 137. As the Commission found, entrance facilities connect ILEC and CLEC networks and "are less costly to build, are more widely available from alternative providers, and have greater revenue potential" than facilities to transport traffic between ILEC wire centers. *Id.* ¶ 138. Entrance facilities also "often represent the point of greatest aggregation of traffic in a competitive LEC's network," and, because CLECs can choose the location of their switches, they "have a unique degree of control over the cost of entrance facilities." *Id.* The record before the Commission also demonstrated that CLECs "are able to obtain entrance facilities from third-party providers." *Id.* ¶ 138 n.389.

CTC *et al.* do not dispute any of this, but seek to contract the definition of entrance facility in order to obtain backhaul facilities as UNEs. They argue, based on a pair of footnotes in the *Triennial Review Order*, that a circuit connecting an ILEC switch to a CLEC switch should be deemed dedicated transport — rather than an entrance facility — if the ILEC has installed *any* equipment at the end of the circuit terminating at the CLEC's premises. *See* CTC *et al.* at 23-25.

The footnotes in the *Triennial Review Order*, however, are irrelevant because the D.C. Circuit vacated those dedicated transport UNE rules in *USTA II*. Instead, the relevant definition is found in the regulations promulgated in the *TRRO*, where the Commission defined a "route" for purposes of its dedicated transport UNE rule as "a transmission path between one of an incumbent LEC's wire centers or switches and another of the incumbent LEC's wire centers or switches." 47 C.F.R. § 51.319(e). A "wire center," in turn, is defined as "the location of an incumbent LEC local switching facility containing one or more central offices." *Id.* § 51.5. In sum, only facilities that run between two ILEC switches are potentially subject to unbundling under the Commission's rules. This is confirmed by the Commission's sole discussion in the *TRRO* of "reverse collocation," which notes that "wire center" includes certain "incumbent LEC *switches* . . . that are 'reverse collocated' in non-incumbent LEC collocation hotels." *TRRO* ¶ 87 n.251 (emphasis added). Indeed, unless an ILEC deploys a switch at a CLEC premises, it would be impossible to classify that location into one of the Commission's wire center tiers. This appears to be the sole purpose of CTC *et al.*'s claim here, as they implicitly suggest (at 24) that a CLEC premises that contains ILEC equipment other than a switch should be treated as a Tier 3 wire center. Such a ruling would eviscerate the Commission's finding of no impairment with respect to entrance facilities, as incumbents normally deploy the equipment at both ends of an entrance facility, when a CLEC purchases such a facility from an incumbent.

In any event, the footnotes in the *Triennial Review Order* on which CTC *et al.* rely do not support their position here. The Commission did not hold in the *Triennial Review Order* that reverse collocation of any equipment qualified a CLEC premises as a wire center for purposes of the definition of dedicated transport. Instead, in the very footnote on which CTC *et al.* rely, the Commission expressly noted that, "to the extent that an incumbent LEC has *local switching*

equipment . . . 'reverse collocated' in a non-incumbent LEC premises, the transmission path from this point back to the incumbent LEC wire center shall be unbundled as transport between incumbent LEC switches or wire centers to the extent specified in this Part." *TRO* ¶ 369 n.1126 (emphasis added). CTC *et al.* also point to the Commission's EEL eligibility criteria, where the Commission stated that a CLEC can satisfy the requirement that a circuit terminate "into a section 251(c)(6) collocation arrangement in an incumbent LEC central office" "through reverse collocation." *Id.* ¶¶ 604-605. Although CTC *et al.* make much of the fact that the Commission, in this context, "adopt[ed] SNiP LiNK's definition of all mutually-agreeable interconnection methodologies," *id.* ¶ 605, the EEL eligibility criteria have nothing to do with the definition of the dedicated transport UNE, where the Commission plainly required reverse collocation of an ILEC *switch*.

D. The Commission Should Not Permit Wireless Carriers To Obtain UNEs

In its petition for reconsideration, T-Mobile rehashes claims that have been repeatedly and decisively rejected by the Commission and the D.C. Circuit. Simply put, wireless carriers have long successfully competed — and, therefore, are not impaired — without UNEs. In the *Triennial Review Order*, the Commission held that "CMRS carriers are ineligible for dedicated transport from their base station to the incumbent LEC network." *TRO* ¶ 368. Although the Commission, in that order, did permit wireless carriers to obtain access to some UNEs, the D.C. Circuit vacated that portion of the *Triennial Review Order*, holding that the Commission "clearly cannot justify a finding of impairment with respect to wireless," because "market evidence already demonstrates that existing rates outside the compulsion of § 251(c)(3) don't impede competition." *USTA II*, 359 F.3d at 576-77. In the *TRRO*, the Commission heeded the D.C. Circuit's holding and "prohibit[ed] the use of UNEs for the exclusive provision of mobile

wireless service," by which it meant "all mobile wireless telecommunications services." *TRRO* ¶ 34 nn.97, 99. The Commission also held that, even assuming requiring unbundling for wireless carriers could provide "incremental benefits," "the costs of requiring . . . unbundling" would outweigh any such benefits. *Id.* ¶ 36.

T-Mobile does not challenge — and, with respect to the D.C. Circuit's decision, does not mention — any of this. Instead, it asserts that wireless carriers are impaired in competing with wireline carriers, and therefore should obtain UNEs. As an initial matter, T-Mobile does not come close to demonstrating impairment, because wireless carriers are actively and successfully competing with wireline carriers today. As of year-end 2004, wireless lines had displaced approximately 11 million wireline access lines, and approximately 7-8 percent of wireless users had given up their landline phones.[22] Approximately 3 million additional wireless subscribers are now giving up their wireline phones each year.[23] For households headed by someone under 24 years of age, 18 percent had a cellular telephone only.[24] At least 14 percent of U.S. consumers now use their wireless phone as their primary phone.[25] Even for customers who have not "cut the cord," wireless carriers are competing successfully to displace telephone calls that

[22] Indeed, one analyst puts the number even higher: "Between 10% and 15% of the total market is now using wireless exclusively. . . . For the youth segment — college students and twentysomethings — it's significantly higher. The notion of wireless as a substitution for wireline is happening very significantly." *Dialing into Wireless Stocks; As Wireless Builds Momentum Against Wireline, S&P's Kenneth Leon Points to the Best Companies in Service and Equipment*, Business Week Online (Mar. 10, 2005).

[23] *See* B. Bath, Lehman Brothers, *Final UNE-P Rules Positive for RBOCs* at 4 & Figure 2 (Dec. 10, 2004).

[24] Clyde Tucker, Brian Meekins, J. Michael Brick & David Morganstein, *Household Telephone Service and Usage Patterns in the United States in 2004*, at 23 (Feb. 2005).

[25] C. Wheelock, In-Stat/MDR, *Cutting the Cord: Consumer Profiles and Carrier Strategies for Wireless Substitution* at 1 (Feb. 2004) ("14.4% of US consumers currently use a wireless phone as their primary phone").

previously were made on wireline networks. Analysts estimate that wireless calls account for 30 percent of all voice minutes and that wireless subscribers use their wireless phones for 60 percent of their long-distance calls.[26]

At bottom, T-Mobile wants UNEs so that it can "reduce its monthly costs of service," and regardless of whether it uses the reduced costs to take customers from wireline carriers or other wireless carriers. T-Mobile at 5-6. But the Supreme Court held long ago that the Commission cannot regard "*any* increase in cost . . . imposed by denial of a network element" as a UNE as a source of impairment warranting imposition of unbundling under § 251(c)(3). *Iowa Utils. Bd.*, 525 U.S. at 389-90. A competitor is not "impaired in its *ability* to provide services" when it can "receive[ ] a handsome profit" without UNEs, even if it could receive "an even handsomer one" with UNEs. *Id.* at 390 n.11. The D.C. Circuit similarly held that "the purpose of the Act is not . . . to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate." *USTA II*, 359 F.3d at 576.

T-Mobile also ignores the D.C. Circuit's directive that the Commission's "impairment rule take into account . . . the costs of unbundling (such as discouragement of investment in innovation)." *Id.* at 572. T-Mobile simply has no answer to the Commission's finding that requiring incumbents to provide UNEs to wireless carriers would "create disincentives . . . to deploy innovative services and facilities, and is an especially intrusive form of economic regulation — one that is among the most difficult to administer." *TRRO* ¶ 36. For all of these reasons, the Commission should again reject T-Mobile's attempt to obtain UNEs.

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[26] D. Janazzo, *et al.*, Merrill Lynch, *The Next Generation VIII: The Final Frontier?* at 5 (Mar. 15, 2004); Eighth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 18 FCC Rcd 14783, ¶ 102 (2003) ("One analyst estimates that wireless has now displaced about 30 percent of total wireline minutes."); V. Grover, Needham, *New Year's Resolution – Avoid the Bells* at 1 (Dec. 29, 2003).

E. The Commission Should Not Modify Its No Impairment Finding for UNE Switching

1. In the *TRRO*, the Commission adopted a "nationwide bar" on mass-market circuit switch unbundling. *TRRO* ¶ 204. That decision was correct on the record before the Commission, and subsequent events have only confirmed the validity of that decision. Intermodal competition in the mass market — from cable companies, VoIP providers, and wireless carriers — continues to grow rapidly. Cable companies are aggressively rolling out voice telephone service to their customers, including the widespread deployment of IP-based services. By the end of 2004, cable companies offered telephony services (VoIP or switched) to at least 32 percent of U.S. households.[27] The growth in cable telephony deployment has only continued in 2005. To take but one example, Time Warner added more than 150,000 net new customers in the first quarter of 2005 — about 30 percent more than in the fourth quarter of 2004 — and in the second quarter of 2005 was adding more than 15,000 net new subscribers per week.[28] Vonage is similarly adding 15,000 customers per week for its VoIP service.[29] As noted above, wireless carriers continue to win ever-increasing numbers of wireline lines and minutes.

APCC *et al.* are the only parties to take issue with the Commission's finding. They do not dispute the Commission's general finding that competitors do not need UNE access to incumbent circuit switches to compete for mass-market customers. Instead, they seek to

[27] *See* C. Moffett, *et al.*, Bernstein Research Call, *Cable and Telecom: VoIP Deployment and Share Gains Accelerating; Will Re-Shape Competitive Landscape in 2005*, at Exhibit 1 (Dec. 7, 2004).

[28] *See* Time Warner Inc. Press Release, *Time Warner Inc. Reports First Quarter 2005 Results* (May 4, 2005); Thomson StreetEvents, *TWX – Q1 2005 Time Warner Inc. Earnings Conference Call*, Conference Call Transcript at 3 (May 4, 2005).

[29] Vonage Press Release, *Vonage Contracts with Verizon for Nomadic Voip E9-1-1 Service* (May 4, 2005).

preserve the UNE-P for a single class of CLECs, those serving payphone service providers ("PSPs"). The payphone business, however, is declining precisely because of intermodal competition — namely, wireless service. As the Supreme Court and the D.C. Circuit have repeatedly held, the issue is whether competition is possible without UNEs, not whether CLECs with particular business plans will succeed. The fact that PSPs are a decreasingly lucrative set of customers provides no basis under the 1996 Act for giving a price break to CLECs that seek to serve them.

Nor is there any merit to APCC *et al.*'s claim that the Commission should have relied on its "at a minimum" authority to *require* unbundling, even in the absence of impairment, to further Congress's goals related to payphones as set forth in 47 U.S.C. § 276. *See* APCC *et al.* at 15-19. In *USTA II*, the D.C. Circuit squarely rejected this reading of the "at a minimum" clause. As APCC *et al.* do here, CLECs argued in *USTA II* that "the 'at a minimum' clause . . . mean[s] that the FCC may order unbundling even in the absence of an impairment finding if it finds concrete benefits to unbundling that cannot otherwise be achieved." 359 F.3d at 579. The D.C. Circuit expressly rejected each of the arguments the CLECs raised, *see id.* at 579-80, and held that, contrary to their claims, the purpose of the "at a minimum" clause is to prevent the Commission from issuing "an unbundling order [that] might adversely affect the Act's other goals" even where the Commission finds impairment, *id.* at 580. That is, impairment is a *necessary, but not sufficient*, condition for the imposition of UNE requirements, and the 1996 Act "mandate[s] . . . consideration" of factors, "such as an unbundling order's impact on investment," that counsel against requiring UNEs even in the face of impairment. *Id.*; *see id.* at 572. For these reasons, the Commission correctly held in the *TRRO* that it should "address the

payphone industry through our implementation of section 276," not by "distort[ing]" the "unbundling framework." *TRRO* ¶¶ 23, 221 n.607.

2. In any event, there is no merit to APCC *et al.*'s claims that PSPs constitute a separate market and that it demonstrated impairment in that market. *First*, PSPs do not constitute a separate market of potential customers for CLECs for purposes of a lawful impairment analysis. APCC *et al.* concede that PSPs normally purchase the same kinds of lines as other mass-market customers. *See* APCC *et al.* at 7. APCC *et al.*'s sole claim that PSPs constitute a different market is the assertion that PSPs provide less revenue opportunity than other mass-market customers. *See id.* But their data are based on self-reported figures from only three CLECs. *See* Reply Comments of APCC *et al.* at 10 n.12, WC Docket No. 04-313 & CC Docket No. 01-338 (filed Oct. 19, 2004). APCC *et al.* provide no back-up detail or any reason to think that these data are either accurate or representative. In any event, it is well settled that "[a]ttributes of [consumers] do not identify markets." *Menasha Corp. v. News America Mktg. In-Store, Inc.*, 354 F.3d 661, 665 (7th Cir. 2004). Even if it were true that PSPs or grandmothers, as a class, provide less revenue opportunity for CLECs (and ILECs) than other groups of mass-market customers, that does not make either PSPs or grandmothers a separate market for purposes of determining whether impairment exists.

Second, APCC *et al.* did not demonstrate that CLECs are impaired in serving PSPs without UNE-P. As noted above, APCC *et al.*'s claims regarding the average revenue from a payphone line are flawed, as the figure they use is based on self-reporting by three unidentified CLECs, with no back-up data or explanation of APCC *et al.*'s survey methodology. Even using that revenue figure, however, APCC *et al.* themselves showed that CLECs can obtain a 32-percent net margin serving PSPs in at least one state. *See* Ex Parte Letter from Jacob S. Farber,

Dickstein Shapiro Morin & Oshinsky LLP (Counsel for APCC *et al.*), to Marlene H.Dortch, FCC, at 5 (Dec. 7, 2004). APCC *et al.*'s comments also showed, as the Commission noted, that "switch-based CLECs . . . remain in the payphone segment of the market [and] are willing to serve" some areas, including two such CLECs serving PSPs in Detroit. Comments of APCC *et al.* at 18, WC Docket No. 04-313 & CC Docket No. 01-338 (filed Oct. 4, 2004); *see TRRO* ¶ 222 n.611 (noting that the PSP "commenters themselves concede that it is possible to serve payphone service providers using competitive switches in at least some markets"). APCC *et al.*'s cost data, moreover, are based only on costs in SBC and BellSouth regions, *see* APCC *et al.* at 13-14, which fatally undermines their effort to demonstrate impairment *nationwide*.[30]

Finally, APCC *et al.* entirely ignore that Commission's determination that, "even if some limited impairment might exist in some markets, [it] would decline to require unbundling of mass market local circuit switching pursuant to [its] 'at a minimum' authority, based on the investment disincentives that unbundled local circuit switching, and particularly UNE-P, creates." *TRRO* ¶ 218; *see id.* ("[W]e bar unbundling to the extent there is any impairment where — as here — unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition."); *id.* ¶ 220 ("The record demonstrates the validity of concerns that unbundled mass market switching discourages competitive LEC

[30] The Commission reasonably concluded in the *TRRO* that APCC *et al.* "incorrectly compared costs based on state-specific estimates taken from January 2003 BOC filings with average estimated revenues not necessarily related to the actual revenues carriers could earn in those states." *TRRO* ¶ 222 n.611. APCC *et al.* do not dispute that, when they filed their data, they made no attempt to correlate their cost and revenue claims on a state-by-state basis. Instead, APCC *et al.* attempt to correct this flaw in their petition for reconsideration, by asserting for the first time that the two sets of data "almost precisely matched." APCC *et al.* at 3; *see id.* at 13. But APCC *et al.* still do not demonstrate that their revenue data are from the same time period as their cost data, and their "almost precise[] match[]" covers only 11 of the 50 states. In any event, for the reasons set forth above, APCC *et al.* fall far short of demonstrating impairment even with this additional information.

investment in, and reliance on, competitive switches."). The Commission's findings in this regard would provide sufficient grounds for rejecting APCC *et al.*'s petition even aside from the fact that there is no merit to their claims of impairment.

III. THE COMMISSION SHOULD REJECT THE CLECS' PROPOSED MODIFICATIONS TO THE BUSINESS LINE AND COLLOCATION COUNTS USED IN ITS WIRE CENTER TRIGGERS

A. The Commission Should Reject the CLECs' Proposal for Modifying Its Rules for Counting Business Lines

As noted above, in the *TRRO*, the Commission used business-line density as a proxy for determining whether competitors are impaired without UNE access to high-capacity loops and dedicated transport. In setting the business-line density thresholds, the Commission explained that it used "ARMIS 43-08 business lines, plus business UNE-P, plus UNE-loops." *TRRO* ¶ 105 (footnote omitted). The Commission did not include "business lines served by competing carriers entirely over competitive loop facilities," despite recognizing that such data would "provide a more complete picture." *Id.*

The Commission held that this same line-count methodology would be used to determine the ILEC wire centers in (or between) which incumbents must provide UNE high-capacity loops and dedicated transport. Thus, the Commission adopted a definition of "business line" that mirrored the data the Commission considered in setting its thresholds. *See* 47 C.F.R. § 51.5 ("The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements."). The Commission limited business lines to "those access lines connecting end-user customers with incumbent LEC end-offices for switched services," and provided that, for non-DS0 lines, "each 64 kbps-equivalent [shall be counted] as one line." *Id.*

Birch *et al.* and CTC *et al.* take issue with the Commission's line-counting methodology, proposing modifications that would have the effect of reducing the line counts in all ILEC wire centers. *See* Birch *et al.* at 10-17; CTC *et al.* 11-16. These CLECs' proposals are contrary to the Commission's goal of creating a system that would provide a "simplified ability to obtain the necessary information," *TRRO* ¶ 105, in the apparent hope that increased complexity will avoid the elimination of unbundling. These CLECs also propose to modify the line-counting methodology for identifying the wire centers that meet the thresholds, while leaving the thresholds themselves untouched, further demonstrating that the real purpose of their proposals is not more accurate line counts but increased unbundling. Indeed, it would be plain error for the Commission to use one line-counting methodology for setting the thresholds and another for determining whether those thresholds are satisfied. Such an apples-to-oranges comparison would be unquestionably arbitrary and capricious. The Commission could not adopt the modifications these CLECs propose without also modifying — and substantially reducing — the business-line count thresholds that it established.

In any event, the criticisms these CLECs raise are without merit. *First*, Birch *et al.* (at 11-12, 14-15) contend that the Commission's decision to count "64 kbps-equivalent[s]" is inconsistent with the ARMIS methodology. But the "ARMIS 43-08 business line[]" data on which the Commission relied are based on the exact same rule: "ISDN and other digital access lines should be reported as 64 kbps equivalents. A fully equipped DS-1 line, for example,

corresponds to 24 64 kbps equivalents."[31] The ARMIS portion of Verizon's business-line data came straight from three columns on the ARMIS report (fc, fd, and fe) with no modifications.[32]

Thus, to the extent these CLECs contend that the 64 kbps equivalents rule should not be applied to UNE-L and UNE-P arrangements, they are actually arguing for a divergence from the ARMIS methodology. *See* Birch *et al.* at 13-14; CTC *et al.* at 13-14. And their arguments in support of diverging from that methodology lack merit. Birch *et al.* (at 13), for example, note that CLECs may provide some unswitched or data services over a DS1 UNE loop. But there is no question that the revenues CLECs can obtain from providing those services are central to the impairment analysis — that is, the question whether it is possible for CLECs to compete for these business customers without using UNEs.[33] Therefore, it is appropriate to consider all the circuits on a high-capacity UNE loop, even if the CLECs might use some for non-switched services.

CTC *et al.* argue that the 64 kbps equivalents rule does not precisely reflect the increased revenue opportunities on DS1 and DS3 loops. *See* CTC *et al.* at 13. But this argument misses the point. Business-line density is used as a proxy of the ability of CLECs to compete. As long as use of the 64 kbps equivalents rule provides a useful approximation of the possibility of competition — and CTC *et al.* offer no data to the contrary — there is no error in using that rule. That rule is also necessary to ensure that business lines are counted using a constant metric, as

[31] *See* http://www.fcc.gov/wcb/armis/instructions/2004/definitions08.htm#T3gen.

[32] *See* Ex Parte Letter from Edwin J. Shimizu, Verizon, to Marlene H. Dortch, FCC, WC Docket No. 04-313, CC Docket No. 01-338 (Dec. 7, 2004).

[33] In any event, because UNE loops are not served by incumbents' switches, incumbents have no way of knowing what types of services a CLEC is providing over those loops. Birch *et al.*'s proposal to permit CLECs to produce their own line-count data is extremely difficult to credit, given CLECs' persistent refusal to provide the Commission with any data at all about their networks during the *TRRO* proceeding. *See TRRO* ¶¶ 105, 158 n.442.

the ARMIS report uses that rule. In any event, because the Commission's business line counts ignore loops that entirely bypass the incumbents' networks — loops that are the surest demonstration that competition is possible in a wire center, but that are given no weight in the impairment analysis — any supposed overcounting from use of the 64 kbps equivalents rule is immaterial.

Second, the CLECs complain that the Commission counts all UNE loops, not merely those used for business customers. *See* Birch *et al.* at 14-15; CTC *et al.* at 14-15. As these CLECs recognize, incumbents do not track UNE-L lines by business and residential customers, and they propose no meaningful way to obtain these data.[34] In any event, the CLECs themselves have argued repeatedly that the embedded base of UNE loops serves business, not residential, customers. *See*, *e.g.*, *TRO* ¶ 440 ("Z-Tel then estimates that only 200,000 mass market lines are served through UNE-L."). Contrary to CTC *et al.*'s claim (at 14), the BOCs' data likewise showed that the "vast majority" of the 3 million "mass-market [UNE-L] lines were being provided to small business customers." UNE Fact Report 2004 at II-41 – II-42 (attached to Letter from Evan T. Leo, Kellogg, Huber, Hansen, Todd & Evans, PLLC, to Marlene H. Dortch, FCC, WC Docket No. 04-313 & CC Docket No. 01-338 (Oct. 4, 2004)). For all of these reasons, it was reasonable for the Commission to include all UNE-L lines in determining the business-line density of wire centers.

[34] CTC *et al.* (at 15 & n.30) assert, based on a long-ago expired condition to the SBC/Ameritech merger, that SBC could today identify which UNE loops are used to serve residential customers. But, even if this were true as to SBC, it would provide no basis for finding that Verizon or any other incumbent maintains such data.

B. The Commission Should Reject Claims To Require Unbundling Automatically in the Future in Wire Centers That Satisfied the DS1 and DS3 Loop and Dedicated Transport Tests at the Time of the *TRRO*

In the *TRRO*, the Commission based its thresholds for finding no impairment for high-capacity loops and dedicated transport on a snapshot of incumbent wire centers. *See, e.g.*, *TRRO* ¶ 105. The Commission, therefore, held that wire centers and routes in which the Commission found no impairment based on that snapshot would not be subject to automatic unbundling in the event of subsequent changes to the number of business lines or fiber-based collocators. Thus, the Commission's DS1 rule provides that, "[o]nce a wire center exceeds both of these thresholds, no future DS1 loop unbundling will be required in that wire center." 47 C.F.R. § 51.319(a)(4)(i); *see id.* § 51.319(a)(5)(i) (same, DS3 loops). Similarly, the Commission's transport rules provide that, "[o]nce a wire center is determined to be a Tier 1 wire center, that wire center is not subject to later reclassification as a Tier 2 or Tier 3 wire center." *Id.* § 51.319(e)(3)(i); *see id.* § 51.319(e)(3)(ii) (same, Tier 2 wire centers).

A number of CLECs take issue with the Commission's conclusion,[35] but their arguments cannot be squared with *USTA II* and other precedent holding that the fundamental question posed by the impairment standard is whether competition is *possible*. *See, e.g.*, *USTA II*, 359 F.3d at 571, 575. The Commission used the business-line density and fiber-based collocation thresholds it established as proxies for determining where competition without UNEs is possible. Although such competition is possible long before those thresholds are satisfied, there can be no serious claim that the subsequent departure of a fiber-based collocator or a reduction in the number of business lines attached to an incumbent's switch demonstrates that competition is now impossible in that wire center without UNEs. Indeed, neither group of CLECs challenging this

[35] *See* Birch *et al.* at 22-25; CTC *et al.* at 5-7.

aspect of the Commission's rules even attempts to argue that such changes necessarily reflect the development of new "structural impediments to competition," which would be necessary to find impairment. *USTA II*, 359 F.3d at 572. Nor do they acknowledge that such changes could be the result of increased competition.

For example, under the rules the Commission has adopted for counting business lines, the number of such lines can be expected to *decrease* as competition in a wire center increases. That is because increased competition will result in CLECs moving greater numbers of business lines off of the ILEC's switch and serving customers by bypassing the ILEC's network entirely. Similarly, intermodal competitors, which likewise do not rely on incumbents' switches to provide service, continue to win business lines from incumbents and are doing so at an increasing rate. All of these business lines will disappear from the Commission's line counts, but not because of any increased structural barrier to competition. A reduction in the number of fiber-based collocators can also be attributable to increased competition. For example, less efficient CLECs — which had survived only through the price break that comes with UNEs — may be displaced by more efficient carriers. Intermodal competitors not only take lines off of incumbent switches, but make far less use of collocation. And carriers that have deployed fiber-based networks are increasingly using alternatives to collocating at an incumbent's wire center, such as collocation hotels. It would be perverse if such increased facilities-based competition resulted in the reimposition of unbundling requirements. Worse still would be the gaming that such a rule would engender, as CLECs that have currently established collocation arrangements in various wire centers might agree to abandon some of those arrangements so that UNEs would be available again in all of those wire centers.

These CLECs also claim that AT&T's and MCI's fiber-based collocations should not count for purposes of the classification of wire centers, in light of the pending acquisitions of MCI and AT&T by Verizon and SBC, respectively. *See* Birch *et al.* at 22-24; CTC *et al.* at 5-6.[36] But these claims are simply a specific instance of their more general claim that unbundling requirements should reappear whenever conditions change. The fact that AT&T and MCI, while unaffiliated with any incumbent, established fiber-based collocation arrangements in particular wire centers is evidence that competition is possible in those wire centers. The subsequent acquisition of those companies changes nothing about the characteristics of the wire centers at issue that led AT&T and MCI to establish fiber-based collocation in the first place.[37]

IV. THE COMMISSION SHOULD REJECT THE CLECS' PROPOSALS FOR MODIFYING ITS EEL ELIGIBILITY CRITERIA

In the *TRRO*, the Commission did not modify the EEL eligibility criteria that it adopted in the *Triennial Review Order*. *See TRRO* ¶¶ 85 n.244, 230 n.644. The Commission has stated that the purpose of those eligibility criteria is to ensure, "on a circuit-by-circuit basis," that EELs are available only where a competitor is "provid[ing] local voice service over that circuit to a customer." *TRO* ¶¶ 599, 602. The Commission stated further that the criteria are intended to prevent providers of "exclusively long-distance voice or data services" from obtaining EELs. *Id.* ¶ 598. In other words, the current EEL eligibility criteria are supposed to prevent CLECs from obtaining EELs as UNEs to provide a service — long-distance — as to which they are not

[36] CTC *et al.* (at 2-4) take issue with the public-interest benefits of these transactions. But those claims — which are without merit — should be addressed in the dockets the Commission has established to review those transactions.

[37] For this reason, Birch *et al.*'s reliance (at 23) on the Commission's affiliate rules in the context of wireless auctions is misplaced. The question here is not whether *future* bids will be independent — the purpose of the Commission's "control" regulation, 47 C.F.R. § 1.2110(c)(5)(v) — but instead whether *past* actions demonstrate that wire centers have characteristics that make competition possible without UNEs.

impaired. As Verizon has demonstrated elsewhere, the current rules do not go nearly far enough to ensure that CLECs do not obtain UNEs to provide exclusively long-distance services. The changes that the CLECs propose here would exacerbate the flaws in the current criteria, and should be rejected.

First, Birch *et al.* recognize that the *TRRO* "for the first time adopt[ed] a direct prohibition on the use of UNEs exclusively for the provision of long distance services" by making a finding of no impairment as to such services, but draw the wrong conclusion from that fact, claiming that the EEL eligibility criteria are no longer necessary. Birch *et al.* at 7-9. In fact, the Commission's express (and inescapable) finding of no impairment should have led the Commission to *strengthen* the EEL eligibility criteria. In any event, the key point for present purposes is that the EEL eligibility criteria have always been intended to be the *means* to ensure compliance with the Commission's substantive rules regarding EELs. *See Supplemental Order Clarification* ¶ 21; *TRO* ¶ 591. The fact that the Commission's decision to prohibit carriers from using EELs exclusively for long-distance services is now based on a finding of no impairment does nothing to eliminate the need for a means of ensuring that CLECs are complying with the Commission's requirement.[38]

Second, CTC *et al.* argue that both the EEL eligibility criteria and the Commission's finding that carriers are not impaired without access to UNEs for the exclusive provision of long-distance service violate *USTA II*. But the D.C. Circuit held in both *CompTel*[39] and *USTA II* that

[38] Birch *et al.* (at 9-10) claim, based on vague and unsubstantiated generalizations, that the Commission's EEL eligibility requirements have proved time-consuming to implement and that ILECs' audit rights have imposed costs on CLECs. Such claims could provide no basis to eliminate rules that the Commission has concluded are necessary to prevent the use of EELs exclusively for the provision of long-distance services.

[39] *Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8 (D.C. Cir. 2002) ("*CompTel*").

the FCC may impose eligibility criteria that a carrier must satisfy before it can obtain access to UNEs as part of an EEL. In addition, the D.C. Circuit expressly stated in *USTA II* that it expected that the Commission, on remand, would "find no[] [impairment] with reference to long distance service." *USTA II*, 359 F.3d at 592. Indeed, the D.C. Circuit noted that "CLECs ha[d] pointed to no evidence suggesting that they are impaired with respect to the provision of long distance services" without access to UNEs. *Id.* In the *TRRO*, the Commission recognized that "competition has evolved without access to UNEs" in the long-distance market and found that, even assuming that unbundling could provide "incremental benefits" in that market, "the costs of requiring . . . unbundling" would outweigh any such benefits. *TRRO* ¶ 36. CTC *et al.* complain that the Commission's analysis here was somehow insufficient, but identifies no record evidence that could possibly support a finding of impairment with respect to long-distance services, let alone that would justify a requirement to provide UNEs after "account[ing] [for] not only the benefits but also the costs of unbundling." *USTA II*, 359 F.3d at 572.[40] In sum, CTC *et al.* identify no conflict between the Commission's decision and *USTA II* that would support their

[40] CTC *et al.*'s sole claim (at 8-10) is that the pending acquisitions of MCI and AT&T by Verizon and SBC, respectively, alter the impairment analysis. But, as the Commission has repeatedly held, the "long distance service market is competitive." *TRRO* ¶ 36 n.107 (citing orders). Nothing about these transactions will change that, as there is no shortage of available capacity on existing facilities-based long-distance networks. Indeed, the Commission previously found that this "capacity will likely enable the[] firms [that have built fiber-based networks], those that buy fiber capacity, and resellers to constrain any exercise of market power by any market participant or group of market participants." Memorandum Opinion and Order, *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, 13 FCC Rcd 18025, ¶ 43 (1998); *see id.* ¶¶ 68, 72. In any event, CTC *et al.* do not even assert — let alone carry their burden of proving — that carriers will be unable to compete in the provision of long-distance services without UNEs as a result of these transactions. In the absence of such proof, as the Supreme Court and D.C. Circuit have held, the Commission cannot permit the use of UNEs for long-distance services. *See supra* page 10.

proposals to eliminate the EEL eligibility criteria or permit CLECs to use UNEs to provide long-distance services.

Finally, CTC *et al.* seek a modification of the eligibility criteria to permit carriers to obtain EELs if they provide "local *data* service," but no local *voice* service. CTC *et al.* at 11 (emphasis added). The Commission, however, has made clear that its EEL eligibility criteria "focus on local *voice* service," both "due to its verifiability and its role as the core competitive offering . . . in direct competition to traditional incumbent LEC service." *TRO* ¶ 595. Adoption of the modification CTC *et al.* propose would enable CLECs to use EELs virtually exclusively for long-distance voice and data as long as they provide a peppercorn of "local" data service — a term CTC *et al.* tellingly leave undefined. Such a modification would do nothing to promote competition in local telephony and, contrary to CTC *et al.*'s claim (at 11), would undermine the deployment of advanced services. As the Commission has repeatedly recognized, the imposition of unbundling requirements decreases the incentives of competitors and incumbents alike to invest in broadband facilities. *See, e.g.*, *TRO* ¶ 213; *271 Broadband Forbearance Order*[41] ¶ 21.

[41] Memorandum Opinion and Order, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496 (2004) ("*Broadband Forbearance Order*"), *petitions for review pending, AT&T Corp., et al. v. FCC, et al.*, Nos. 05-1028, *et al*. (D.C. Cir.).

CONCLUSION

For the foregoing reasons, the petition for reconsideration of Iowa Telecom should be granted and all the other petitions should be denied in their entirety.

Respectfully submitted,

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June 6, 2005

APPENDIX A

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. They are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.

APPENDIX B

C

Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
N.D. Georgia, Atlanta Division.
BELLSOUTH TELECOMMUNICATIONS, INC., Plaintiff,
v.
MCIMETRO ACCESS TRANSMISSION SERVICES, LLC, et al., Defendants.
No. 1:05-CV-0674-CC.

April 5, 2005.

Matthew Henry Patton, Michael E. Brooks, Kilpatrick Stockton, Atlanta, GA, Sean A. Lev, Kellogg Huber Hansen Todd Evans & Figel, Washington, DC, for Plaintiff.

Daniel S. Walsh, Office of State Attorney General, Atlanta, GA, Marc A. Goldman, Jenner & Block, Washington, DC, Dara L. Steele-Belkin, Teresa Wynn Roseborough, Sutherland Asbill & Brennan, Anne Ware Lewis, Frank B. Strickland, Strickland Brockington Lewis, Barry J. Armstrong, McKenna Long & Aldridge, Suzanne W. Ockleberry, AT&T Communications of the Southern States, Inc., Christiane (Tiane) L. Sommer, Governor's Office of Consumer Affairs Consumers' Utility Counsel Division, Atlanta, GA, Newton M. Galloway, Smith Galloway Lyndall & Fuchs, Terri Mick Lyndall, Galloway & Lyndall, LLP, Griffin, GA, for Defendants.

ORDER

COOPER, J.

***1** Before the Court is the Emergency Motion for a Preliminary Injunction filed by plaintiff BellSouth Telecommunications, Inc. ("BellSouth"). Having reviewed the motion, the opposing memoranda, and the extensive record material that has been filed, and having heard argument on April 1, 2005, the Court finds that BellSouth has satisfied each aspect of the four-prong test for preliminary injunctive relief. *See, e.g.*, *Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205 (11th Cir.2003); *American Red Cross v. Plam Beach Blood Bank, Inc.*, 143 F.3d 1407, 1410 (11th Cir.1998).

Accordingly, the Court grants BellSouth a preliminary injunction against the March 9, 2005 Order of the Georgia Public Service Commission ("PSC") in Docket No. 19341-U to the extent that PSC Order requires BellSouth to continue to process new competitive LEC orders for switching as an unbundled network element ("UNE") as well as new orders for loops and transport as UNEs (in instances where the Federal Communications Commission ("FCC") has found that unbundling of loops and transport is not required). Consistent with the FCC's ruling in the *Order on Remand* [FN1] at issue here, to the extent that a competitor has a good faith belief that it is entitled to order loops or transport, BellSouth will provision that order and dispute it later through appropriate channels.

FN1. Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-290 (FCC rel. Feb. 4, 2005).

First, BellSouth has a high likelihood of success in showing that, contrary to the conclusion of the PSC, the FCC's *Order on Remand* does not permit new UNE orders of the facilities at issue. [FN2] BellSouth's position is consistent with the conclusions of a significant majority of state commissions that have decided this issue (BellSouth has provided the Court with decisions from 11 state commissions that support its conclusion) and with what the Court is likely to conclude is the most reasonable interpretation of the FCC's decision.

FN2. In evaluating the merits of BellSouth's legal argument, this Court owes no deference to the PSC's understanding of federal law. *See, e.g.,* *MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.,* 112 F.Supp.2d 1286, 1291 (N.D.Fla.2000), *aff'd,* 298 F.3d 1269 (11th Cir.2002).

The language of the *Order on Remand* repeatedly indicates that the FCC did not allow new orders of facilities that it concluded should no longer be available as UNEs. The FCC held that there would be a "nationwide bar" on switching (and thus UNE Platform) orders, *Order on Remand* ¶ 204. The FCC's new rules thus state that competitors "may not obtain" switching as a UNE. 47 C.F.R. § 51.319(d)(2)(iii) (App. B. to *Order on Remand*); *see also* 47 C.F.R. § 51.319(d)(2)(i) ("An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops."); *Order on Remand* ¶ 5 ("Incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching"); *id.* ¶ 199 ("[W]e impose no section 251 unbundling requirement for mass market local circuit switching nationwide"). The FCC likewise established that competitive LECs are no longer allowed to place new orders for loops and transport in circumstances where, under the FCC's decision, those facilities are not available as UNEs. *Id.* ¶¶ 142, 195.

***2** The FCC also created strict transition periods for the "embedded base" of customers that were currently being served using these facilities. Under the FCC transition plan, competitive LECs may use facilities that have already been provided to serve their existing customers for only 12 more months and at higher rates than they were paying previously. *See id.* ¶¶ 142, 195, 199, 227. The FCC made plain that these transition plans applied only to the embedded base and that competitors were "not permit[ed]" to place new orders. *Id.* ¶¶ 142, 195, 199. The FCC's decision to create a limited transition that applied *only* to the embedded base and required higher payments even for those existing facilities cannot be squared with the PSC's conclusion that the FCC permitted an indefinite transition during which competitive LECs could order new facilities and did not specify a rate that competitors would pay to serve them.

In arguing for a different result, the PSC and the other defendants primarily rely on

paragraph 233 of the *Order on Remand,* which they contend requires BellSouth to follow a contractual change-of-law process before it can cease providing these facilities. That provision, however, states that "carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order." *Order on Remand* ¶ 233. In conflict with that language, the PSC's reading of the FCC's order would render paragraph 233 inconsistent with the rest of the FCC's decision. Instead of not being permitted to obtain new facilities, as the FCC indicated should be the rule, *see, e.g., Order on Remand* ¶ 199, competitive LECs would be permitted to do so for as long as the change-of-law process lasts. Moreover, it is significant that the FCC expressly referred to the possible need to modify agreements to deal with the transition as to the embedded base, *see id.* ¶ 227, but did not mention a need to do so to effectuate its "no new orders" rule, *see id.* In sum, the Court believes that there is a significant likelihood that it will agree with the conclusion of the New York Public Service Commission that paragraph 233 "must be read together with the FCC directives that [UNE Platform] obligations for new customers are eliminated as of March 11, 2005." *New York Order* [FN3] at 13, 26. Any result other than precluding new UNE Platform customers on March 11 would "run contrary to the express directive ... that no new [UNE Platform] customers be added" and thus result in a self-contradictory order. *Id.*

> FN3. Order Implementing TRRO Changes *Ordinary Tariff Filing of Verizon New York Inc. to Comply with the FCC's Triennial Review Order on Remand,* Case No. 05-C-0203 (N.Y.P.S.C. Mar.16, 2005) (*"New York Order"*).

Finally, the Court notes that the PSC does not dispute that the FCC has the authority to make its order immediately effective regardless of the contents of particular interconnection agreements. *See* PSC Order at 3. The Court concludes that it is likely to find that the FCC did that here. The Court further notes that it would be particularly appropriate for the FCC to take that action because it was undoing the effects of the agency's own prior decisions, which have repeatedly been vacated by the federal courts as providing overly broad access to UNEs. *See United Gas Improvement Co. v. Callery Props., Inc.,* 382 U.S. 223, 229, 86 S.Ct. 360, 15 L.Ed.2d 284 (1965) ("An agency, like a court, can undo what is wrongfully done by virtue of its order."); *see also USTA v. FCC,* 359 F.3d 554, 595 (D.C.Cir.2004) (highlighting the FCC's "failure, after eight years, to develop lawful unbundling rules, and [its] apparent unwillingness to adhere to prior judicial rulings"). In any event, any challenge to the FCC's authority to bar new UNEPlatform orders must be pursued on direct review of the FCC's order, not before this Court.

***3** In concluding that BellSouth has a substantial likelihood of success on the merits, the Court does not reach the issue whether an "Abeyance Agreement" between BellSouth and a few of the defendants authorizes those defendants to continue placing new orders. That issue is pending before the PSC, and this Court's decision does not affect the PSC's authority to resolve it.

Second, BellSouth has demonstrated that it is currently suffering significant irreparable injury as a result of the PSC's decision. BellSouth has shown that as a direct result of

the PSC's decision, it is currently losing retail customers and accompanying goodwill. For instance, BellSouth has demonstrated that it is losing approximately 3200 customers per week to competitors that are using the UNE Platform. The defendants do not seriously dispute that BellSouth is losing these customers; on the contrary, MCI confirms that it is using the UNE Platform to sign up 1500 BellSouth customers per week. Under Eleventh Circuit precedent, losses of customers are irreparable injury. *See, e.g.,* *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441, 1449 (11th Cir.1991) (holding that loss of customers is irreparable injury and agreeing with district court that, if a party "lose[s] its long-time customers," the injury is "difficult, if not impossible, to determine monetarily") (internal quotation marks omitted); *see also* *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir.1996) (finding irreparable harm where FCC rules implementing this same statute "will force the incumbent LECs to offer their services to requesting carriers at prices that are below actual costs, causing the incumbent LECs to incur irreparable losses in customers, goodwill, and revenue"). BellSouth has therefore demonstrated the existence of very significant immediate and irreparable injury.

Third, the Court finds that BellSouth's injury outweighs the injury that will be suffered by the private defendants. The Court concludes that, although some competitive LECs may suffer harm in the short-term as a result of this decision, they will do so only if they intended to compete by engaging in conduct that the FCC has concluded is anticompetitive and contrary to federal policy. In particular, paragraph 218 of the *Order on Remand* states that the UNE Platform "hinder[s] the development of genuine, facilities-based competition," contrary to the federal policy reflected in the Telecommunications Act of 1996. Thus, although defendants are free to compete in many other ways, their interest in continuing practices that the FCC has condemned as anticompetitive are entitled to little, if any, weight, and do not outweigh BellSouth's injury. *See, e.g.,* *Graphic Communications Union, Local No. 2 v. Chicago Tribune Co.*, 779 F.2d 13, 15 (7th Cir.1985) (holding that private interest in avoiding arbitration could not count as evidence of "irreparable harm," because such a holding "would fly in the face of the strong federal policy in favor of arbitrating disputes"). Moreover, the Court notes that competitive LECs have been on notice at least since the FCC's August 2004 *Interim Order* [FN4] that soon they might well not be able to place new orders for these UNEs.

> FN4. Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 16783, ¶ 29 (2004) (proposing a transition plan that "does not permit competitive LECs to add new customers").

***4** *Fourth,* the Court concludes that BellSouth's motion is consistent with and will advance the public interest, as authoritatively determined by the FCC. As discussed, the FCC has determined that the UNE Platform harms competition and thus is contrary to the public interest. The FCC explained that its prior, overbroad unbundling rules had "frustrate[d] sustainable, facilities-based competition," *Order on Remand* ¶ 2, that its new rules would "best allow[ ] for innovation and sustainable competition," *id.,* and that it would be "contrary to the public interest" to delay the effectiveness of the *Order on*

Remand for even a "short period of time," *id.* ¶ 236. The FCC further concluded that immediate implementation of the *Order on Remand* is necessary to avoid "industry disruption arising from the delayed applicability of newly adopted rules." *Order on Remand* ¶ 236 (emphasis added). Unless and until a federal court of appeals overturns the FCC *Order on Remand* on direct review, the FCC's judgment establishes the relevant public-interest policy here.

* * *

As BellSouth has satisfied the test for preliminary injunctive relief, it is hereby ORDERED AND ADJUDGED that Plaintiff's Emergency Motion for Preliminary Injunction is GRANTED. The Court hereby preliminarily enjoins the Georgia Public Service Commission and the other defendants from seeking to enforce the PSC Order to the extent that order requires BellSouth to process new UNE orders for switching and, in the circumstances described above, for loops and transport.

For the same reasons as those set forth above with respect to this Court's grant of preliminary injunctive relief to BellSouth, the Joint Defendants' Motion for Stay is DENIED.

BellSouth's motion for preliminary injunction having now been considered and determined, all Defendants are DIRECTED to answer or otherwise respond to BellSouth's Complaint within seven (7) days of the date of this Order. Any answers or responses already submitted to the Court by Defendants shall be deemed filed as of the date of this Order for all purposes under the Federal Rules of Civil Procedure and the local rules of this Court.

ORDERED.

2005 WL 807062 (N.D.Ga.)

Motions, Pleadings and Filings **(Back to top)**

• 1:05CV00674 (Docket)
(Mar. 11, 2005)

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APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

BELLSOUTH TELECOMMUNICATIONS, INC.,	)	
Plaintiff,	)	Civil Action No. 3:05-CV-16-JMH
v.	)	
CINERGY COMMUNICATIONS CO., a/k/a CINERGY COMMUNICATIONS, CORP., ET AL.	)	**MEMORANDUM OPINION AND ORDER**
Defendants.	)	

** ** ** ** **

This matter is before the Court on Plaintiff's motion for a preliminary injunction [Record No. 2]. Having reviewed the motion, responses, reply, and voluminous record, and having heard oral argument on the matter on April 18, 2005, the Court finds that a preliminary injunction is warranted.

I. Factual and Procedural Background

The Telecommunications Act ("the Act") places a duty on incumbent local exchange carriers ("ILECs"), like the plaintiff BellSouth Telecommunications, Inc. ("BellSouth"), that have traditionally provided local telephone services to an area, to lease unbundled network elements ("UNE") on a cost basis to new entrants into the market, called competitive local exchange carriers ("CLECs"). 47 U.S.C. § 251. The Act authorizes the Federal Communications Commission ("FCC" or "the Commission") to determine the network elements and the proper candidates for this

low rate of services. A "network element" is defined as "a facility or equipment used in the provision of a telecommunications services." *Id.* The unbundled network elements platform ("UNE-P") is composed of switching functions, shared transport, and loops. The only network element at issue in the preliminary injunction is switching.

The Act states that the FCC should consider "at a minimum, whether ... access to such network elements as are proprietary in nature is necessary; and ... [whether] the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." *Id.*

In the late 1990s, the FCC imposed blanket unbundling, which is requiring ILECs to make available as UNEs, *all* or a certain listed number of the piece parts of their local networks in certain geographic areas. The Supreme Court invalidated this practice in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), because the FCC had not properly considered whether unbundling was necessary or whether the CLECs were impaired. *Id.* at 388-92.

In response, the FCC ruled that impairment was shown if without unbundling, the CLEC's ability to provide services was materially diminished. *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 419 (D.C. Cir. 2002) ("*USTA I*"). The D.C. Circuit subsequently struck the FCC's attempt to correct their

interpretation of "impair" and held that the FCC must differentiate between cost disparities for entrants into *any* market and the telecommunications market. *Id.* at 426-27.

The FCC then issued a Review Order that held that CLECs were impaired without unbundled access to ILEC switches for the mass market, but delegated to each state the authority to make more nuanced impairment determinations. *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 564 (D.C. Cir. 2004) ("*USTA II*").

The D.C. Circuit in *USTA II* vacated the FCC rule allowing states to conduct impairment analyses as well as the Commission's national finding of impairment for mass market switching. The court found that the ultimate authority to determine impairment lies with the FCC and, thus, delegation to the states was improper. Further, the court held the Commission's national finding of impairment was improper because it was impermissibly broad. *Id.* at 569-72.

Subsequently, the FCC issued the Order on Remand, the Order at issue in this case, which held that CLECs "are not impaired in the deployment of switches" and that "the disincentives to investment posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, justify a nationwide bar on such unbundling." Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket

No. 01-338, FCC 04-290, at ¶ 112 (FCC Feb. 4, 2005) ("Order on Remand").

The Order on Remand stated that "[g]iven the need for prompt action, the requirements ... shall take effect on March 11, 2005." *Id.* at ¶ 134. The Order discussed a transition plan for "embedded" or existing customers, wherein CLECs must submit orders to convert to alternative service arrangements in which time the parties would modify their interconnection agreements. The time period set for the transition was twelve months. *Id.* at ¶¶ 128-29.

Prior to the Order on Remand, BellSouth filed a petition with the Kentucky Public Service Commission ("PSC") to establish a generic docket, asking it to decide whether interconnection agreements pursuant to §§ 251 and 252 of the Act were deemed amended on the effective date of the FCC Unbundling Rules, to the extent the rates in the agreements conflicted with rates in the FCC Order.

As soon as the Order on Remand was issued and prior to resolution of the generic petition it filed with the PSC, BellSouth notified CLECs that as of March 11, 2005, it would no longer accept *new* switching orders to those facilities that were not required by the FCC order. Cinergy, one of the defendants in this case, filed a motion for emergency relief to the PSC, requesting that the Commission order BellSouth to continue accepting and processing their orders, including *new* orders pursuant to the change of law

provisions in their agreement. Various other CLECs also asked for the same relief.

On March 10, 2005, the PSC issued two orders granting the relief the CLECs requested. Order, *In re Petition of BellSouth Telecommunications, Inc. to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Docket No. 2004-00427 (Ky. PSC Mar. 10, 2005); Order, *In re Joint Petition of NewSouth Communications Corp., et al.*, Docket No. 2004-00044 (Ky. PSC Mar. 10, 2005). The PSC found that the change of law provisions in the interconnection agreements controlled and must be followed in order to modify the agreements to reflect changes implemented by the Order on Remand. The PSC rejected BellSouth's position that the Order on Remand was immediately effective on March 11, 2005, for new orders.

BellSouth then filed a complaint in this Court against the PSC and various CLECs seeking declaratory and injunctive relief from the two PSC orders for switching, loops, and transports. BellSouth simultaneously filed an emergency motion for preliminary injunction seeking relief from the PSC orders in so far as the orders refer to switching.[1]

II. Applicable Law

In order to determine whether a preliminary injunction should

[1] Because the motion for a preliminary injunction does not seek relief as to loops or transports, the injunction is inapplicable to the defendant US LEC of Tennessee, Inc.

be granted, the Court considers the following factors:

> (1) whether the movant has a "strong" likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction.

Leary v. Daeschner, 228 F.3d 729, 736 (6th Cir. 2000). The factors are not prerequisites to entry of a preliminary injunction, but instead should be balanced against each other. *Id.*; *United States v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004). The party seeking a preliminary injunction has the burden of persuasion to show that the factors weigh in favor of the Court granting the motion. *Leary*, 228 F.3d at 739. While the Court balances the factors, the plaintiff must prove irreparable harm in order to obtain an injunction. *ExtraCorporeal Alliance, LLC v. Rosteck*, 285 F. Supp. 2d 1028, 1040 (N.D. Ohio 2003).

A. Strong Likelihood of Success on the Merits

Whether BellSouth has a strong likelihood of success on the merits is dependent on whether the FCC's Order on Remand is self-effectuating for new orders or whether it should be effectuated through the change of law process in the defendants' interconnection agreements. BellSouth asserts the former, while the defendants assert the latter.

After a thorough review of the language in the Order on Remand, the Court finds that BellSouth has a strong likelihood of success on the merits. For example, the Executive Summary in the

Order on Remand states that:

> Incumbent LECs have *no obligation* to provide competitive LECs with unbundling access to mass market local switching. We adopt a 12-month plan for competing carriers to transition away from use of unbundling mass market local circuit switching. This transition plan applies only to the embedded customer base, and *does not permit competitive LECs to add new switching UNEs*.

Order on Remand at ¶ 5 (emphasis added). The Order on Remand also states that the Commission "impose[s] no section 251 unbundling requirement for mass market local circuit switching nationwide." *Id*. at ¶ 199. Concerning the effective date, the Order on Remand states that "[g]iven the need for prompt action, the requirements set forth here shall take effect on March 11, 2005, rather than 30 days after publication in the Federal Register." *Id.* at ¶ 235. The strong language in the Order on Remand that ILECs no longer have an obligation to provide UNE-P switching and the corresponding effective date of March 11, 2005, will likely lead the Court to conclude that Order on Remand is self-effectuating for new orders.

Further, the Order reiterates that the "transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundling access to local circuit switching pursuant to section 251(c)(3) except as otherwise specified in this Order." *Id*. at ¶ 227. During the transition period, ILECs are paid a higher rate for existing orders than that paid prior to the Order on Remand. *Id.* at ¶ 228. If the defendants' interpretation is accepted, then

BellSouth would be paid less for servicing *new* orders than *existing* orders. Also, the transition plan sets a specific time period within which the interconnection agreements shall be changed in order to effectuate the Order on Remand. If the defendants' position is accepted, it is possible that BellSouth would be processing *new* orders longer than it is required to accept *existing* orders at the lower prices mandated by the interconnection agreements.

The defendants point to paragraph 233 which provides:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements *consistent with our conclusions in this Order*. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in necessary delay.

Order on Remand at ¶ 233 (emphasis added). The defendants argue that the language in this paragraph should be read to mean that the transition plan applies to existing orders and that new orders should be effected pursuant to the parties' interconnection agreements, focusing on the sentence "carriers must implement changes to their interconnection agreements consistent with our

conclusions in this Order." *Id.*

This paragraph, however, should be read in the context of the entire Order on Remand and not in isolation. BellSouth is likely to succeed in arguing that the language "carriers must implement changes to their interconnection agreements *consistent with our conclusions in this Order*" simply refers to existing customers that, pursuant to the transition plan, must be effectuated through the change of law processes in the interconnection agreements. The paragraph should also be read together with the mandate that the transition plan shall only apply to existing orders and that the Order on Remand shall be effective March 11, 2005, "[g]iven the need for prompt action." *Id.* at ¶ 235.

The defendants also argue that paragraph 227's statement that the transition plan does not permit "new UNE-P arrangements using unbundling access to local circuit switching pursuant to section 251(c)(3) *except as otherwise specified in this Order*" refers to paragraph 233's mandate that interconnection agreements be used to effectuate the process. The more reasoned analysis, however, is that paragraph 227 refers to paragraph 228 that states "the transition mechanism adopted here is simply a default process, and pursuant to section 252(a)(1), carriers remain free to negotiate alternative arrangements superseding this transition period." *Id.* at ¶ 228. Thus, paragraph 227 is interpreted to mean that parties are free to negotiate a longer or shorter transition period.

The Court is not alone in its analysis of BellSouth's likelihood of success; two of the four district courts that have dealt with this issue have ruled similarly. *BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs.*, LLC, No. 1:05-CV-0674, at 1-6 (N.D. Ga. April 5, 2005) (granting injunction to BellSouth); *BellSouth Telecomms., Inc. v. Miss. Pub. Serv. Comm'n,* No. 3:05-CV-173, at 6-11 (S.D. Miss. April 13, 2005) ("*Miss. PSC*") (granting injunction to BellSouth); *contra MCIMetro Access Transmission Servs., LLC v. Mich. Bell Tel. Co.*, No. 05-CV-709885 (E.D. Mich. Mar. 11, 2005) (order without opinion that grants an injunction to CLECs, but is later withdrawn due to parties' settlement); *Ill. Bell Tel. Co. v. Hurley*, No. 05-C-1149, at 7-12 (E.D. Ill. Mar. 29, 2005). Further, a clear majority of state commissions have agreed that the Order on Remand is self-effectuating for new orders.[2]

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[2] For instance, Indiana, New York, Ohio, California, New Jersey, Texas, Rhode Island, Kansas, Massachusetts, Michigan, and Maine all are in accord with BellSouth's interpretation of the Order on Remand. See *Miss. PSC*, No. 3:05-CV-173, at 8-9 n.6, for commission orders cited therein. Delaware, North Carolina, and Florida also have held that the Order on Remand is self-effectuating for new orders. *See* Open Meeting, *Complaint of A.R.C. Networks, Inc., d/b/a/ InfoHighway Communications, and XO Communications, Inc., Against Verizon Delaware Inc., for Emergency Declaratory Relief Related to the Continued Provision of Certain Unbundled Network Elements After the Effective Date of the Order on Remand (FCC 04-290 2005)*, Docket No. 334-05 (Del. PSC Mar. 22, 2005); Notice of Decision and Order, *In the Matter of Complaints Against BellSouth Telecommunications, Inc. Regarding Implementation of the Triennial Review Remand Order*, Docket No. P-55, Sub-1550, at 4-5 (N.C. PSC Apr. 15, 2005); Vote Sheet, *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting From Changes in Law, by BellSouth Telecommunications, Inc.*, Docket No. 041269-TP, at Issue 2 (Fla. PSC Apr. 5, 2005).

The defendants assert that even if the Order on Remand is read to conclude that new orders are not permitted, the FCC is without authority to abrogate interconnection agreements. This is a collateral attack that is not appropriately before the Court and should instead be brought as a direct appeal of the FCC's Order. *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984); *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 394 F.3d 568, 569 (8th Cir. 2004).

Even if this is not a collateral attack on the FCC's Order, the FCC had authority to mandate that the Order on Remand would be self-effectuating for new orders because the FCC has been given the authority to implement the Act. *Iowa Utils. Bd.*, 525 U.S. at 385. Thus, "[t]o the extent a state commission's judgment concerning the interpretation of an approved agreement conflicts with the FCC's interpretation of the FCC regulations, the FCC's interpretation

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Commissions that agree with the Kentucky PSC are Tennessee, Louisiana, Illinois, Alabama, and South Carolina. *See* Transcript of Proceedings, *In re BellSouth's Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Docket No. 04-00381 (Tenn. PSC Apr. 11, 2005); Letter, *Staff's Recommendation Regarding MCI's Motion for Emergency Relief*, Docket No. 28131 (La. PSC 2005); *Illinois Bell Telephone Co. v. Hurley*, Docket No. 05-C-1149, at 7-12 (N.D. Ill. Mar. 29, 2005); Order, *Temporary Standstill Order and Order Scheduling Oral Argument*, Docket No. 29393 (Ala. PSC Mar. 9, 2005); *Commission Directive, Petition of BellSouth Telecommunications, Inc. to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Docket No. 2004-316-C (S.C. PSC Apr. 13, 2005) (merely establishing ninety day period within which ILECs must continue to accept new orders from CLECs).

controls under the Supremacy Clause." *Miss. PSC*, No. 3:05-CV-173, at 15 (citing *MCI Telecommuns. Corp. v. Bell Atl.-Penn. Serv.*, 271 F.3d 491, 516 (3d Cir. 2001)). Further, the FCC was merely undoing the effect of its prior repudiated rules that were negotiated into the regulated interconnection agreements.[3] *Id.* at 13-14.

While the defendants also argue that the Act places independent obligations for ILECs to provide unbundling services pursuant to § 271, this Court is not the proper forum to address this issue in the first instance. The enforcement authority for § 271 unbundling duties lies with the FCC and must be challenged there first. *Miss. PSC*, No. 3:05-CV-173, at 17.

Lastly, the NewSouth joint defendants argue that they are not subject to the preliminary injunction because an Abeyance Agreement and subsequent Abeyance Order was entered by the PSC that specifically states that the joint defendants and BellSouth agree

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[3] The defendants argue that the only way the FCC may abrogate contracts is through the *Mobile-Sierra* doctrine, which has not been followed because the FCC did not make a particularized finding that abrogating the contracts was in the public interest. However, the Court is likely to find that due to the fact that the interconnection agreements are not privately negotiated contracts, the *Mobile-Sierra* doctrine is not applicable. *See e.g., Atl. City Elec. Co. v. FERC,* 295 F.3d 1, 14 (D.C. Cir. 2002) (The *Mobile-Sierra* doctrine provides authority to federal agencies to abrogate "freely negotiated private contracts" provided the agency makes "a particularized finding that the public interest required the modification" of the contracts.). *See also e.spire Communications, Inc. v. N.M. Pub. Regulation Comm'n*, 392 F.3d 1204, 1207 (10th Cir. 2004) (holding that interconnection agreements are not private contracts but, instead, arise from ongoing federal and state regulations).

that their prior interconnection agreements would be in place until the change of law resulting from the *USTA II* progeny was incorporated into new agreements. As the two district courts dealing with the exact issue have held, this Court does not have to reach whether the Abeyance Agreement and Order authorizes new orders to be placed because this very issue is before the PSC. Thus, our decision on the preliminary injunction "does not affect the PSC's authority to resolve it." *MCIMetro, No. 1:05-CV-0674, at 6; Miss.* PSC, No. 3:05-CV-173, at 17-18 n.11.

B. Balancing the Harms

In deciding whether a preliminary injunction is appropriate, the Court must balance the harm to the plaintiff if the injunction is denied and the harm to the defendants if the injunction is granted. *Mich. Bell Tel. Co. v. Engler*, 257 F.3d 587, 599 (6th Cir. 2001). The harm to the plaintiff must be irreparable; it is not sufficient if the plaintiff merely shows that it will suffer economic damages in the absence of an injunction. *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992). An injunction is inappropriate, thus, if the plaintiff will suffer purely economic harm that is compensable through monetary damages. "[A]n exception exists where the potential economic loss is so great as to threaten the existence of the movant's business." *Performance Unlimited, Inc. v. Questar Publ'rs, Inc.*, 52 F.3d 1373, 1382 (6th Cir. 1995).

1. Harm to BellSouth

The defendants argue that BellSouth has only asserted damages that are fully compensable with a monetary award. The defendants assert that the damages are readily calculable by comparing the higher rate BellSouth would be able to charge CLECs for new UNE-P switching orders versus the lower rate BellSouth is required to charge pursuant to the interconnection agreements.

The defendants' argument misses the mark because the plaintiff does not merely assert monetary damages. It is true that BellSouth alleges damages flowing from the difference in price between the lower price mandated by the interconnection agreements and the higher price the company could charge if the bar on unbundling was immediately lifted. These damages alone would not be sufficient to warrant an injunction because they are readily calculable.

BellSouth, however, also alleges damages resulting from an inability to compete with the CLECs who can offer services at a lower rate than BellSouth because of the low cost of switching. As a result, BellSouth asserts that it will lose customers and goodwill if an injunction is not granted. BellSouth submitted proof that it would lose approximately 943 customers a week without an injunction. The defendants did not controvert this proof, but assert that the damages flowing from loss of customers are monetary.

The Court agrees with BellSouth that the damages flowing from

loss of customers is irreparable because it is impossible to predict the probable length of the lost customers' relationships with BellSouth or whether the customers would return to BellSouth after a decision on the merits in BellSouth's favor. *Basicomputer*, 973 F.2d at 512 (holding that "loss of customer goodwill often amounts to irreparable injury because the damages flowing from such losses are difficult to compute"); *Mich. Bell Tel. Co.*, 257 F.3d at 599 (noting that "loss of established goodwill may irreparably harm a company"); *Lexington-Faytte Urban County Gov't v. BellSouth Telecomms., Inc.*, No. 00-5408, 2001 WL 873629, at *3 (6th Cir. July 26, 2001) (holding that the lower court did not abuse discretion in finding that BellSouth suffered irreparable harm through loss of customers because of a delayed entry into the marketplace) (unpub.); *Ferro v. Ass'd Materials, Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991) (finding that the movant established irreparable injury through loss of customers and good will).

The defendants cite *Southern Milk Sales, Inc. v. Martin,* 924 F.2d 98, 103 (6th Cir. 1991), that upheld a finding of a lack of irreparable harm through loss of customers. In *Southern Milk*, an agricultural cooperative brought suit to enjoin a competitor from interfering with cooperative agreements that provided the plaintiff with the exclusive rights to act as the sole agent for dairy farmers in Michigan. The Sixth Circuit held that there was no irreparable harm because the market was not limited and it was

unclear whether an injunction would prevent customers from taking their business elsewhere. *Id*.

Southern Milk is contrary to later Sixth Circuit cases, cited by the Court above, that hold that irreparable harm may be found from loss of customers and goodwill and fail to mention a "limited market" exception. In two cases in particular, the movants were telecommunications companies and the Sixth Circuit upheld the lower courts' finding of irreparable harm due to loss of customers and goodwill without mentioning whether the market was limited. *Mich. Bell Tel. Co.*, 257 F.3d at 599; *Lexington-Fayette Urban County Gov't*, 2001 WL 873629, at *3. Because the cases conflict, the Court follows the later cited cases that uphold findings of irreparable harm from loss of customers and goodwill where a telecommunication company is concerned.

2. Harm to CLECs

The CLECs maintain that if an injunction is entered, they will suffer harm that far outweighs any harm suffered by BellSouth if the motion is denied. Specifically, the CLECs state that granting the injunction will upset the status quo instead of maintaining it; will deny the CLECs meaningful opportunities to negotiate the interpretation of the Order on Remand; would cause the CLECs to lose customers and goodwill from the inability to receive UNE-P services at a lower rate; and would result in customers being immediately be cut off from ordering new services.

BellSouth argues that the CLECs' only harm is the harm resulting from not being able to receive unbundling services for new orders at the lower rate mandated by the interconnection agreements. This harm, BellSouth argues, should not be balanced because requiring ILCEs to provide unbundling services to CLECs at a lower cost is contrary to the federal public policy of barring unbundling because it is anti-competitive. Additionally, BellSouth argues that the status quo was established by the Order on Remand and upset by the PSC orders.

The Court agrees with the plaintiff. The Order on Remand establishes the federal policy of not requiring unbundling of switches for new orders. The CLECs' interest in a practice the FCC has stated is "anti-competitive" has very little weight, if any, in balancing the harms. *Graphic Communications Union, Local No. 2 v. Chicago Tribune Co.*, 779 F.2d 13, 15 (7th Cir. 1985) (Analyzing the defendants' motion for a stay of the district court's order compelling arbitration, the Seventh Circuit held that a stay would be improper because it would be contrary to "strong federal policy in favor of arbitrating disputes.").

Finally, the "status quo" will not be disrupted because the CLECs were on notice that no new UNE-P orders for switching may be accepted because the Interim Order stated that the "transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers at these rates."

Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 16783, at ¶ 29 (FCC Aug. 20, 2004). The Order on Remand also stated that the Order was effective immediately on March 11, 2005. Order on Remand at ¶ 235. Thus, while the CLECs are correct in arguing that the status quo established by the PSC orders will be disrupted by an injunction, the status quo established by the Order on Remand is maintained by an injunction.

C. Public Interest

BellSouth argues that the public interest is furthered by an injunction because it favors facilities-based competition, the ultimate goal of the Act. The defendants, on the other hand, argue that the public interest favors denying an injunction because the public may lose access to new services provided through CLECs. The defendants also state that the public interest in stability of contracts and in competition would be harmed. Additionally, the defendants argue that the public interest in an orderly transition and the PSC's ability to interpret interconnection agreements would be harmed by an injunction.

While entering an injunction may cause some disruption in service to CLEC customers, the FCC has stated the federal policy of encouraging facilities-based competition is disparaged by mandating unbundling services to CLECs. As such, the public interest favors

entry of a preliminary injunction that reflects that policy. Further, an injunction does no more harm to the PSC's ability to interpret federal telecommunications law or interconnection agreements, than do the processing of appeals for PSC orders authorized by the Act.

III. Conclusion

Based on the foregoing, the Court finds that all four factors weigh in favor of granting an injunction.

Accordingly, **IT IS ORDERED:**

(1) That Plaintiff's motion for preliminary injunction [Record No. 2] be, and the same hereby is, **GRANTED**; and

(2) That the defendants be, and the same hereby are, **ENJOINED** from enforcing the portion of the PSC orders dated March 10, 2005, that require BellSouth to continue to process new orders for UNE-P switching.

This the 22nd day of April, 2005.

Signed By:
Joseph M. Hood
United States District Judge

APPENDIX D

Motions, Pleadings and Filings

United States District Court,
S.D. Mississippi,
Jackson Division.
BELLSOUTH TELECOMMUNICATIONS, INC. Plaintiff
v.
MISSISSIPPI PUBLIC SERVICE COMMISSION, Dorlos "BO" Robinson, in His Official Capacity as the Chairman of the PSC, Nielson Cochran, in His Official Capacity as the Vice Chairman of the PSC, and Michael Callahan, in His Official Capacity as Commissioner of the PSC Defendants
Nuvox Communications, Inc., KMC Telecom III, LLC, and KMC Telecom V, Inc., Xspedius Communications LLC on Behalf of Its Operating Subsidiaries Xspedius Management Co. Switched Services, LLC and Xpedius Management Co. of Jackson, and Communigroup of Jackson, Inc. D/B/A Communigroup and McImetro Access Transmission Services LLC Defendant-Intervenors
No. CIV.A. 3:05CV173LN.

April 13, 2005.

Background: Incumbent local exchange carrier (ILEC) brought action challenging state public service commission's order allowing competitive local exchange carriers (CLEC) to place new unbundled network element-platform (UNE-P) switching orders. ILEC moved for preliminary injunction.

Holdings: The District Court, Tom S. Lee, J., held that:
(1) Federal Communications Commission's (FCC) ruling that ILECs were no longer required to provide CLECs with access to unbundled switching was not subject to negotiation process dictated by parties' interconnection agreements, and
(2) ILEC was likely to prevail on merits of its claim.
Motion granted.

[1] Injunction 138.1

212k138.1 Most Cited Cases
To prevail on request for preliminary injunctive relief, burden is on plaintiff to show: (1) substantial likelihood that plaintiff will prevail on merits, (2) substantial threat that irreparable injury will result if injunction is not granted, (3) that threatened injury outweighs threatened harm to defendant, and (4) that granting preliminary injunction will not disserve public interest.

[2] Telecommunications 860

372k860 Most Cited Cases
Federal Communications Commission's (FCC) ruling that incumbent local exchange carriers (ILEC) would no longer be required to provide competitive local exchange carriers (CLEC) with access to unbundled switching was not subject to negotiation process dictated by

parties' interconnection agreements, but rather was immediately effective on date established in order, even though ruling required parties to negotiate in good faith regarding any rates, terms, and conditions necessary to implement rule changes; ILECs entered into interconnection agreements only because they were forced to do so by prior FCC order, and ruling expressly directed that no new unbundled network element-platform (UNE-P) customers be added. Communications Act of 1934, § 271, as amended, 47 U.S.C.A. § 271.

[3] Telecommunications 856
372k856 Most Cited Cases
To extent state public service commission's judgment concerning interpretation of approved interconnection agreement between incumbent local exchange carriers (ILEC) and competitive local exchange carriers (CLEC) conflicts with Federal Communications Commission's (FCC) interpretation of FCC regulations, FCC's interpretation controls under Supremacy Clause. U.S.C.A. Const. Art.
6, § 2.

[4] Telecommunications 903
372k903 Most Cited Cases
Incumbent local exchange carrier (ILEC) was likely to prevail on merits of its claim that it had no obligation to allow competitive local exchange carriers (CLEC) to place new unbundled network element-platform (UNE-P) switching orders, and thus ILEC was entitled to preliminary injunction barring state public service commission from requiring it to accept such orders, where Federal Communications Commission (FCC) ruled that it was no longer required to provide competitive local exchange carriers (CLEC) with access to unbundled switching, ILEC was losing substantial number of customers to CLECs, and CLECs had alternative means of competing with ILEC.

John C. Henegan, Butler, Snow, O'Mara, Stevens & Cannada, Jackson, Sean A. Lev--PHV, Kellogg, Huger, Hansen, Todd, Evans & Figiel, PLLC, Washington, DC, Thomas B. Alexander, BellSouth Telecommunications, Inc., Jackson, for Plaintiff.

George M. Fleming, Mississippi Public Service Commission, Steven J. Allen, Brunini, Grantham, Grower & Hewes, Kathryn H. Hester, Watkins Ludlam Winter & Stennis, P.A., Robert P. Wise, Wise, Carter, Child & Caraway, Jackson, James U. Troup--PHV, McGuirewoods, LLP--Washington, Washington, DC, for Defendants.

MEMORANDUM OPINION AND ORDER

TOM S. LEE, District Judge.

***1** This cause is before the court on the motion of plaintiff BellSouth Telecommunications (BellSouth) for preliminary injunction asking that the court enjoin the March 9, 2005 order entered by the Mississippi Public Service Commission to the extent that such order allows competitors to place new UNE-Platform orders. Defendant Mississippi Public Service Commission (PSC) and the various intervenors filed responses in opposition to the motion.

Based on its review of the parties' submissions and their arguments to the court at the April 8th hearing on the motion, the court concludes that BellSouth's motion should be granted.

On February 4, 2005, the Federal Communications Commission (FCC) released its Triennial Order on Remand (TRRO) in CC Docket No. 01-338 following remand in *United States Telecom Association v. Federal Communications Commission*, 359 F.3d 554 (D.C.Cir.2004). [FN1] In the TRRO, among other things, the FCC established new unbundling rules regarding mass market local circuit switching, high-capacity loops and dedicated interoffice transport. All that is relevant to the present motion is its ruling as to mass market switching. [FN2] Prior to the TRRO, the FCC, pursuant to its authority under the Telecommunications Act of 1996, had consistently held that incumbent local exchange carriers (incumbent LECS), such as BellSouth, were required to provide access to the individual parts of their network systems--switches, loops and transport--on an unbundled basis and at prescribed prices, in order that the competitive LECS would be in a position to effectively compete in the marketplace. These individual parts of the system are known as "unbundled network elements" or UNEs, and as BellSouth explains, access to unbundled switching is important because it makes it possible for competitive LECs to obtain the UNE Platform (or UNE-P), which consists of all the individual or piece-parts of the BellSouth network combined.

In its TRRO, the FCC ruled that the ability of competitive LECs to compete would not be impaired without access to unbundled switching, and concluded, therefore, that incumbent LECs would no longer be required to provide competitive LECs with access to unbundled switching. It specifically recognized that immediate implementation of its new rules posed a potential for disruption in service, and therefore established a twelve-month transition period, with accompanying transition pricing, for migration of competitive LECs' "embedded customer base" from UNE-P to alternate arrangements for service. The FCC determined that this twelve-month transition period would provide "adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition," and hence gave carriers twelve months from the date of the TRRO to "modify their interconnection agreements, including completing any change of law processes," to implement the changes directed by the TRRO. [FN3] The FCC stated in the TRRO, however, that the transition period it adopted applied "only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3)...."

***2** Accordingly, on February 11, 2005, BellSouth sent out a "Carrier Notification" to all of its competitive LECs advising that as of March 11, 2005, the effective date of the TRRO, BellSouth would no longer accept orders for switching as a UNE item. A number of the competitive LECs responded by filing a Joint Petition for Emergency Relief with the PSC, asking that BellSouth be directed to continue to provide unbundled switching in accordance with its undertaking in its interconnection agreements until such time as the parties had completed the change of law process. In response, the PSC entered the order that is the subject of BellSouth's present motion, ruling that the parties were required to adhere to the change of law process in their interconnection agreements and that until such time as

the process, including arbitration, was completed, BellSouth would be required to continue accepting and provision competitive LECs' orders as provided for in their interconnection agreements.

BellSouth brought this action seeking declaratory relief and a preliminary injunction pending the court's expedited review of the PSC's order. BellSouth takes the position that the PSC's order is contrary to, and preempted by the FCC's TRRO, and it thus seeks an order enjoining all defendants from seeking to enforce the PSC's order. [FN4]

[1] To prevail on its request for injunctive relief, the burden is on BellSouth to show "(1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that irreparable injury will result if the injunction is not granted, (3) that the threatened injury outweighs the threatened harm to defendant, and (4) that granting the preliminary injunction will not disserve the public interest." *Mississippi Power & Light Co. v. United Gas Pipe Line Co., 760 F.2d 618, 621 (5th Cir.1985)* (citing *Canal Authority of State of Florida v. Callaway, 489 F.2d 567 (5th Cir.1974)*).

The question of BellSouth's likelihood of success on the merits raises two issues: First, while the FCC's February 4, 2005 Order on Remand unequivocally provides for a "nationwide bar on [unbundled switching]," did the FCC intend that this aspect of its Order would be self-effectuating, and if so, was it within the FCC's jurisdiction to make the bar self-effectuating.

[2] As to the first issue, a comprehensive review of all potentially relevant provisions of the TRRO demonstrates convincingly that the FCC envisioned that the bar on new-UNE-P switching orders would be immediately effective on the date established in the order, March 11, 2005, without regard to the existence of change of law provisions in parties' Interconnection Agreements. The TRRO makes clear in unequivocal terms that the transition period applies only to the embedded customer base, and "does not permit competitive LECs to add new customers using unbundled access to local circuit switching." [FN5] At ¶ 227, the Order recites,

> We require competitive LECs to submit the necessary orders to convert their mass market customers to alternative service arrangement within twelve months of the effective date of this Order. *This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local switching pursuant to section 251(c)(3) except as otherwise specified in this order....* We believe that the twelve-month period provides adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition, which could include deploying competitive infrastructure, negotiating alternative access arrangements, and performing loop cut overs or other conversions. Consequently, carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes. By the end of the twelve month period, requesting carriers must transition the affected mass market local circuit switching UNEs to alternative facilities or arrangements. (Emphasis added).

***3** Given the clarity with which the FCC stated its position on this issue, it is not surprising that the majority of state utilities commissions and courts, by far, having considered this issue have held, on persuasive reasoning, that the FCC's intent in the TRRO is an unqualified elimination of new UNE-P orders as of March 11, 2005, irrespective of change of law provisions in parties' interconnection agreements. [FN6]

Despite this, the PSC and defendant intervenors, relying primarily on § 233 of the TRRO, included in a section entitled "Implementation of Unbundling Determination," argue that the FCC's ruling as to new orders for unbundled switching is not self-effectuating but rather is subject to the negotiation process dictated by the parties' interconnection agreements. Paragraph 233 states:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order.... Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes.

In its March 16, 2005 *Order Implementing TRRO Changes,* the New York Public Service Commission considered and rejected an argument that ¶ 233 of the Order requires incumbent LECs to follow change of law provisions in interconnection agreements with respect to implementation of the bar on new orders for UNE-P switching, stating:

> Although TRRO ¶ 233 refers to interconnection agreements as the vehicle for implementing the TRRO, had the FCC intended to use this process for new customers, we believe it would have done so more clearly. Paragraph 233 must be read together with the FCC directives that UNE-P obligations for new customers are eliminated as of March 11, 2005. Providing a true-up for new UNE-P customers would run contrary to the express directive in TRRO § 227 that no new UNE-P customers be added.

The court in *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, LLC,* No. 1:05CV0674CC, 2005 WL 807062 (N.D.Ga. April 5, 2005), found the New York Commission's reasoning persuasive:

> The PSC's reading of the FCC's order would render paragraph 233 inconsistent with the rest of the FCC's decision. Instead of not being permitted to obtain new facilities, as the FCC indicated should be the rule, *see, e.g., Order on Remand* ¶ 199, competitive LECs would be permitted to do so for as long as the change of law process lasts. Moreover, it is significant that the FCC expressly referred to the possible need to modify agreements to deal with the transition as to the embedded base, *see id.* ¶ 227, but did not mention a need to do so to effectuate its "no new orders" rule, *see id.* In sum, the Court believes there is a significant likelihood that it will agree with the conclusion of the New York Public Service Commission that paragraph 233 "must be read together with the FCC directives that UNE-P obligations for new customers are eliminated as of March 11, 2005.." *New York Order* at 13, 26. Any result other than precluding new UNE Platform customers on March 11, would "run contrary to the express directive ... that no [UNE Platform] customers be added" and thus result in a self-contradictory order. *Id.*

***4** The court similarly finds this reasoning persuasive. [FN7] Moreover, the notion that

BellSouth should be made to negotiate over something which the FCC has determined it has no obligation to offer on an unbundled basis and which BellSouth has no intention of offering simply makes no sense. As was cogently observed by the Rhode Island Public Utilities Commission,

> As a practical matter, it is not obvious to us what issues would remain to be negotiated concerning the section 251 UNEs de-listed by the FCC; the FCC has been clear that these UNEs are no longer required to be unbundled under section 251. The end result after going through the step of amending the interconnection agreements will be the same as enforcing the March 11th deadline immediately, albeit with some delay.
> *Adopting Verizon's Proposed RI Tariff Filing,* Dkt. 3662 (R.I.PUC March 8, 2005).

The PSC and defendant intervenors next argue that even if the court were to conclude that the TRRO was intended to be self-effectuating, it still may not be given effect inasmuch as the FCC lacks jurisdiction to abrogate the terms and conditions of existing interconnection agreements regarding unbundled switching. In this vein, they argue that the parties' respective rights and obligations vis-a-vis BellSouth's provision of unbundled switching are governed exclusively by the parties' voluntarily negotiated interconnection agreements, over which the FCC has no jurisdiction. They further submit that even if the FCC did have jurisdiction to modify or abrogate the interconnection agreements, the TRRO does not reflect that the FCC made the requisite findings under the *Mobile Sierra* doctrine.

These arguments raise the question, highlighted by the parties' arguments, of whether the TRRO was intended to directly abrogate or modify the interconnection agreements, or whether, instead, enforcement of the TRRO would indirectly result in the modification of or abrogation of portions of the interconnection agreements. In either case, however, and despite the defendant and defendant-intervenors' protestations to the contrary, the FCC had authority to act in the manner it did. [FN8]

[3] If the FCC's Order is viewed not merely as a general regulation which bears on the proper interpretation of the interconnection agreements but as an outright abrogation of provisions of parties' interconnection agreements, consideration of its jurisdiction to act in the premises must take into account that interconnection agreements are "not ... ordinary private contract[s]," and are "not to be construed as ... traditional contract[s] but as ... instrument [s] arising within the context of ongoing federal and state regulation." *E.SPIRE Communications, Inc., v. N.M. Pub. Regulation Comm'n,* 392 F.3d 1204, 1207 (10th Cir.2004); *see also* *Verizon Md., Inc. v. Global Naps, Inc.,* 377 F.3d 355, 364 (4th Cir.2004) (interconnection agreements are a "creation of federal law" and are "the vehicles chosen by Congress to implement the duties imposed in § 251"). It cannot reasonably be disputed that the provisions in the various interconnection agreements permitting the UNE Platform are there not because this was something the parties freely and voluntarily negotiated, but rather because this is what BellSouth was required to provide by law, and specifically by the FCC's earlier unbundling decisions. As BellSouth aptly notes, these provisions are vestiges of the now-repudiated FCC regime. *See BellSouth v. MCIMetro Access,* No. 1:05CV0674CC (N.D.Ga. April 5, 2005) ("[I]t would be particularly

appropriate for the FCC to take that action because it was undoing the effects of the agency's own prior decisions, which have been repeatedly vacated by the federal courts as providing overly broad access to UNEs, ... and [i]n any event, any challenge to the FCC's authority to bar new UNE-Platform orders must be pursued on direct review of the FCC's order, not before this Court."); *see also* *AT&T Communications of Southern States, Inc. v. Bellsouth Telecommunications Inc.*, 229 F.3d 457, 465 (4th Cir.2000) (observing that "many so-called 'negotiated' provisions (in interconnection agreements) represent nothing more than an attempt to comply with the requirements of the 1996 Act."); *see also* *BellSouth Telecomms.*, 317 F.3d at 1298 (Anderson, J., concurring) (interconnection agreements are "mandated by federal statute" and even voluntary agreements are "cabined by the obvious recognition that the parties to the agreement had to agree within the parameters fixed by the federal standards"). Thus, it is substantively inaccurate to characterize the FCC's action as an abrogation of private contracts, and more accurate to characterize it as the elimination of the legal requirements that had dictated the substance of the parties' regulatory agreements. [FN9] And while the 1996 Telecommunications Act vested direct jurisdiction over interconnection agreements with the state utilities commissions, it did not divest the FCC of all authority with respect to such agreements. On the contrary, the Supreme Court has clearly held that the FCC has authority to issue rules and orders implementing all aspects of the 1996 Telecommunications Act. *See* *Iowa Utilities Board*, 525 U.S. at 380, 119 S.Ct. 721 (the Act "explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies"). And thus, "[w]hile it is true that the 1996 Act entrusts state commissions with the job of approving interconnection agreements... these assignments ... do not logically preclude the Commission's issuance of rules to guide the state-commission judgments," *id.* at 385, 119 S.Ct. 721. To the extent a state commission's judgment concerning the interpretation of an approved agreement conflicts with the FCC's interpretation of the FCC regulations, the FCC's interpretation controls under the Supremacy Clause. *MCI Telecommunication Corp. v. Bell Atl.-Pa.*, 271 F.3d 491, 516 (3d Cir.2001) (stating that "[i]f the PUC's interpretation conflicts with that of the FCC, the PUC's determination must be struck down"). Here, this court perceives that the FCC has determined as a matter of policy that the Telecommunications Act does not require the provision of unbundled switching and that the bar on new UNE switching orders is to be immediately effective without regard to change of law provisions in specific interconnection agreements. From its conclusion in this regard, in keeping with its plenary authority under the 1996 Act, it follows that the FCC's conclusion prevails over the PSC's contrary conclusion.

***5** Certain of the intervenors, namely Communigroup and MCI, argue that BellSouth "still has to provide [UNE-Platform] under Section 271, regardless of the elimination of [the UNE-Platform] under Section 251." [FN10] The New York Public Utilities Commission considered a similar argument by competitive LECs that even if the incumbent LEC no longer was obliged to provide access to UNE-P under the TRRO determination, it still had an obligation to continue providing such access pursuant to 47 U.S.C. § 271. The Commission rejected the argument, noting that in light of the FCC's decision "to not require BOCs to combine section 271 elements no longer required to be unbundled under section 251, it

[was] clear that there is no federal right to 271-based UNE-P arrangements." This court would tend to agree. It would further observe, though, that even if § 271 imposed an obligation to provide unbundled switching independent of § 251 with which BellSouth had failed to comply, § 271 explicitly places enforcement authority with the FCC, which may "(i) issue an order to such company to correct the deficiency; (ii) impose a penalty on such company pursuant to subchapter V of this chapter; or (iii) suspend or revoke such [company's] approval" to provide long distance service if it finds that the company has ceased to meet any of the conditions required for approval to provide long distance service. Thus, it is the prerogative of the FCC, and not this court, to address any alleged failure by BellSouth to satisfy any statutorily imposed conditions to its continued provision of long distance service.

[4] Based on the foregoing, the court concludes that BellSouth has established a substantial likelihood that it will succeed on the merits of its claim. [FN11] The court also concludes that BellSouth has shown that it will suffer irreparable harm if injunctive relief is not granted. BellSouth has offered proof, unrefuted by the PSC or defendant intervenors, that it is losing more than 5,000 customers a month to UNE-Platform competitors. The opponents of BellSouth's motion argue that this loss can be adequately redressed by an award of monetary relief; yet as BellSouth points out, at the end of the case, this court cannot simply give BellSouth back the customers it has lost, and the monetary loss attending the loss of customers can be difficult, if not impossible to quantify. *See* *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441, 1449 (11th Cir.1991) (recognizing that the "Fifth Circuit has held that the loss of customers and goodwill is an 'irreparable injury,' " and agreeing that where there has been a loss of a party's long-time customers, the injury is "difficult, if not impossible, to determine monetarily") (citations omitted). *See also* *BellSouth v. MCIMetro Access*, 2005 WL 807062, at *3 (finding that BellSouth had demonstrated the existence of "very significant immediate and irreparable injury"); *Illinois Bell Telephone Co. v. Hurley*, 2005 WL 735968, at *7 (agreeing with SBC that "it will suffer irreparable harm because, even if its losses are quantifiable, there is no entity against which SBC could recover money damages").

***6** As for the issue of whether the threatened injury to BellSouth outweighs the threatened harm to the defendant intervenors, the court is persuaded that the competitors have alternative means of competing with BellSouth and that while "some competitive LECs may suffer harm in the short-term [if the requested injunction is granted], they will do so only if they intended to compete by engaging in conduct that the FCC has concluded is anticompetitive and contrary to federal policy." *BellSouth v. MCIMetro Access*, 2005 WL 807062 (observing that "paragraph 218 of the Order on Remand states that the UNE Platform 'hinder[s] the development of genuine, facilities-based competition,' contrary to the federal policy reflected in the Telecommunications Act of 1996."); *see also* State Corp. Commission of Kansas, *Order Granting in Part and Denying in Part Formal Complaint and Motion for Expedited Order,* Dkt. No. 04-SWBT-763-GIT (March 10, 2005) (stating that "any harm claimed by the CLECs to be irreparable today is no different from the harm that they must inevitably face in the relatively short term as a result of implementing the FCC's

new rules. On the other hand, the sooner the FCC's new rules can be implemented, the sooner rules held to be illegal can be abrogated."). [FN12]

The fourth and final requisite for injunctive relief requires that BellSouth demonstrate that granting the preliminary injunction will not disserve the public interest. The FCC determined in its Order that there is a strong public interest in "providing ... consumers with the technical innovation and competition which the FCC has predicted will result from the elimination of mandated unbundled switching," and indeed, it specifically declared that it would be "contrary to the public interest" to delay the effectiveness of its order. TRRO ¶ 236. The court is unpersuaded that there is a sufficient countervailing public interest to warrant denial of BellSouth's motion.

Conclusion

Based on the foregoing, it is ordered that BellSouth's motion for preliminary injunction is granted and the PSC is precluded from enforcing that part of its order requiring BellSouth to continue to process new orders for UNE-P switching.

FN1. *See* Order on Remand, *IN RE UNBUNDLED ACCESS TO NETWORK ELEMENTS*, WC Docket No. 04-313, CC Docket, No. 01-338, 2005 WL 289015 (F.C.C. Feb. 4, 2005).

FN2. BellSouth's complaint in this cause also seeks relief based on provisions of the TRRO concerning the unbundling of loops and transport, but the present motion concerns only the FCC's ruling pertaining to access to switching.

FN3. As dictated by the Telecommunications Act of 1996, 47 U.S.C. §§ 251 and 252, incumbent LECs and competitive LECs operate pursuant to "interconnection agreements" which must conform the legal requirements established by the FCC and which are approved, interpreted and enforced by state public utilities commissions. These interconnection agreements typically specify a change of law process by which the parties are required to engage in notice, negotiation and, if necessary, dispute resolution, to account for changes in the law that apparently occur with relative frequency in this area.

FN4. Reacting to BellSouth's motion, several of the competitive LECs moved to intervene and orders have been entered granting these motions. One purpose for which one of the intervenors, CommuniGroup of Jackson d/b/a Communigroup, sought to intervene was to file a motion to compel arbitration contending that this dispute is subject to arbitration under its interconnection agreement with BellSouth. Although there has been a significant amount of briefing on this arbitration issue by the parties, the court finds it unnecessary to dwell on this motion for it is manifest that CommuniGroup's position with respect to arbitration is misplaced. BellSouth claims, quite simply, that the PSC's order requiring it to continue to process new orders for UNE-P switching violates federal law and should be enjoined. There is no sense in which this dispute falls within the "arbitration" provision of any interconnection agreement. Accordingly, the motion to compel arbitration will be

denied.

FN5. *See* TRRO ¶ 199; *see also* ¶ 5 ("This transition plan applies only to the embedded customer base, *and does not permit competitive LECs to add new switching UNEs.*") (emphasis added); ¶ 127 (quoted in text).

FN6. *See BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, LLC,* No. 1:05CV0674CC, 2005 WL 807062 (N.D.Ga. April 5, 2005) (granting BellSouth's emergency motion for preliminary injunction against order of Georgia PSC to the extent the order required BellSouth to continue to process new orders for switching as an unbundled network element); Ind. Util. Reg. Comm'n, *Order on Complaint of Indiana Bell Tele. Co., Inc. d/b/a SBC Ind. For Expedited Review of a Dispute with Certain CLECs Regarding Adoptino of an Amendment to Commission Approved Interconnection Agreements,* Cause No. 4278, at 7, (March 9, 2005) ("We find the more reasonable interpretation of the language of the TRRO is the intent to not allow the addition of new UNE-P customers after March 10, 2005," irrespective of change of law processes provided by parties' interconnection agreements); Pub. Utilities Comm'n of Ohio, *Order on Emergency Petition for Declaratory Ruling Prohibiting SBC Ohio from Breaching its Existing Interconnection Agreements and Preserving Status Quo With Respect to Unbundled Network Element Orders,* Case No. 05-298-TP-UNC (March 9, 2005) (concluding that while SBC Ohio was required to negotiate and executed interconnection agreements as to embedded customer base, "[t]he FCC very clearly determined that, effective March 11, 2005, the ILECs unbundling obligations with regard to mass market local circuit switching ... would no longer apply to serve new customers"); New York Pub. Serv Comm'n, *Order Implementing TRRO Changes,* Case No. 05-C-0203 (March 16, 2005) ("Based on our careful review of the TRRO, we conclude that the FCC does not intend that new UNE-P customers can be added during the transition period...."); Pub. Util. Comm'n of Ca., *Assigned Commissioner's Ruling Granting in Part Motion for Emergency Order Granting Status Quo for UNE-P Orders,* Application 04-03-014 (March 10, 2005) (concluding that pursuant to the TRRO, "Verizon has no obligatin to process CLEC orders for UNE-P to serve new customers"); Pub. Util. Comm'n of Tex., *Proposed Order on Clarification,* Dkt. No. 28821 (March 8, 2005); New Jersey Bureau Pub. Util., Open Hearing, *Implementation of the FCC's Triennial Review Order,* Dkt. No. TO03090705 (March 11, 2005) (refusing to require Verizon to continue providing unbundled access to New discontinued UNE orders as of March 11th); Rhode Island Pub. Util. Comm;n, Open Meeting, *Adopting Verizon's Proposed RI Tariff Filing,* Dkt. 3662 (March 8, 2005) (adopting tariff filing of Verizon which provide that Verizon would no longer accept orders for the subject elements (i.e., switching) as of March 11, 2005); State Corp. Commission of Kansas, *Order Granting in Part and Denying in Part Formal Complaint and Motion for Expedited Order,* Dkt. No. 04-SWBT-763-GIT (March 10, 2005) (agreeing with incumbent LEC regarding the self-effectuating nature of the TRRO as to serving new customers, and observing that "[i]t does not make sense to delay implementation of these provisions by permitting an interconnection scheme contrary to the FCC's rulings to persist");

Mass. Dept. Of Telecommunications and Energy, *Open Meeting on Complaint Against Verizon for Emergency Declaratory Relief Related to the Continued Provision of Unbundled Network Elements After the Effective Date of the Order on Remand,* Dkt. No. 334-05 (March 22, 2005) (denying request for order requiring Verizon to continue to accept and process orders for unbundled network elements pursuant to their interconnection agreements and to require Verizon to comply with change of law provision); Mich. Pub. Serv. Comm'n, *Order on Application of the Competitive 12 Local Exchange Carriers,* Case No. U-14303, at 9 (March 29, 2005) (concluding that competitors "no longer have a right under Section 251(c)(3) to order [the UNE Platform] and other UNEs that have been removed from the [FCC's] list"); Me. Pub. Util. Comm'n, *Order on Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection and Resold Servs.,* Dkt. No.2002-682, at 4 (March 7, 2005) ("We find that the FCC intended that its new rules de-listing certain UNEs be implemented immediately rather than be the subject of interconnection agreement amendment negotiations before becoming effective."). Contrary holdings have been issued only by the Kentucky and Louisiana Public Utilities Commissions, and the United States District Court for the Northern District of Illinois, *Illinois Bell Telephone Co. v. Hurley,* 2005 WL 735968, *6 (N.D.Ill.2005).

FN7. It does so, as well, recognizing that there is authority to the contrary. *See Illinois Bell Telephone Co. v. Hurley,* 2005 WL 735968, *6 (N.D.Ill.2005) ("Unlike ¶ 227, ¶ 233 of the TRO Remand Order does not address only existing customers. Rather, it falls under the general heading of 'Implementation of Unbundling Decisions' and mandates that the parties 'negotiate in good faith regarding *any* rates, terms, and conditions necessary to implement' the rule changes. This requirement presumably would include the substantially increased rate SBC now wishes to charge the CLECs seeking access to SBC's switches."),

FN8. In the numerous rulings by state utilities commissions and courts addressing the FCC's Order, none to date has directly addressed whether the FCC had jurisdiction to impose its immediate bar to new orders for unbundled switching. Perhaps that is because no party has challenged the FCC's jurisdiction in this regard. Indeed, the recent opinion by the Georgia District Court specifically noted that "the [Georgia] PSC does not dispute that the FCC has the authority to make its order immediately effective regardless of the contents of particular interconnection agreements." *BellSouth v. MCIMetro Access,* 2005 WL 807062, at *2.

FN9. The *Mobile-Sierra* doctrine, invoked by defendant and defendant intervenors, holds that the FCC may abrogate or modify freely negotiated private contracts only if required by the public interest, and requires that the agency make a particularized finding that the public interest requires a modification to or an abrogation of an existing contract. The court is not persuaded that the *Mobile Sierra* doctrine in this context is relevant, particularly given the court's conclusion that the interconnection agreements are not ordinary private contracts

that were freely negotiated between the parties. However, even if the doctrine applied, the FCC's order reflects the Agency's finding that the bar on new UNE-P switching orders should take effect immediately since the continued use of the UNE-Platform "hinder[ed] ... genuine facilities based competition and was thus contrary to public policy. *See* TRRO ¶ 218, 236."

FN10. Section 271 of the Telecommunications Act appears in a section entitled "Special Provisions Concerning Bell Operating Companies," 47 U.S.C. §§ 271 to -276, which applies only to Bell Operating Companies (BOCs), all of which were formerly part of AT & T. Section 271 concerns the authority of BOCs to provide long distance services and provides, in general, that a BOC can only provide long distance services if it first meets certain requirements relating primarily to interconnection. 47 U.S.C. § 271(c).

FN11. As did the Georgia court in *BellSouth v. MCIMetro Access*, 2005 WL 807062, in concluding that BellSouth has sustained its burden as to the first requisite for injunctive relief, the court "does not reach the issue whether an 'Abeyance Agreement' between BellSouth and [Nuvox, KMC and Xpedius] authorizes those defendants to continue placing new orders. That issue is pending before the PSC, and this Court's decision does not affect the PSC's authority to resolve it."

FN12. The court would further note that the competitive LECs have been on notice since at least August 2004 of the possibility that a time would soon come when they would be precluded from placing new orders for switching UNEs. *See Order and Notice of Proposed Rulemaking, Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 16783, ¶ 29 (2004) (proposing a transition plan that "does not permit competitive LECs to add new customers").

--- F.Supp.2d ----, 2005 WL 1076643 (S.D.Miss.)

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CERTIFICATE OF SERVICE

I hereby certify that, on the 6th day of June 2005, I caused a copy of the foregoing Response of Verizon to Petitions for Reconsideration to be served upon each of the parties on the attached service list by first-class mail, postage prepaid.

_____

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